IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-40873
Summary Calendar

MARIA S., as Next Friend for E.H.F. S.H.F. and A.S.G., Minors,

Plaintiff-Appellant

v.

RAMIRO GARZA; RUBEN GARCIA,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas

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(Filed Jan. 4, 2019)

Before: HIGGINBOTHAM, JONES, and SMITH, Circuit Judges.

EDITH H. JONES, Circuit Judge.

Laura S., a Mexican citizen, was in the United States illegally when U.S. Customs and Border Protection ("CBP") agents detained her near Pharr, Texas. In CBP custody, Laura signed a form indicating her decision to repatriate voluntarily. Laura was killed shortly after returning to Mexico. In this lawsuit,

Laura's representatives seek damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971) against Ramiro Garza, a CBP agent, and his supervisor, Ruben Garcia, for coercing Laura into signing the voluntary removal form, thereby denying her due process and causing her death.

The district court granted summary judgment for both defendants. For two independent reasons, we affirm the district court's judgment: (1) "special factors" preclude the extension of a *Bivens* remedy to this "new context" and (2) the defendants were entitled to qualified immunity.

BACKGROUND

I. Detention and Removal

In June 2009, Laura was driving with three friends near Pharr around 2:00 a.m. Local police stopped the car for a driving infraction. A police officer asked for proof of citizenship or immigration status. One of the passengers had a visa, but Laura and two of her friends, Arturo Morales and Saray Cardiel, had no documentation. The police officer notified CBP.

Laura allegedly began to weep and told the officer that Sergio, her ex-boyfriend and the father of two of her children, would hurt her if she returned to Mexico. Sergio had abused and threatened to kill her, and Laura had obtained a protective order against him in McAllen, Texas, though the order had expired in June

2008. Sergio had returned to Mexico and allegedly worked for a drug cartel.

The police officer released Laura, Morales, and Cardiel to CBP Agent Ramiro Garza, who drove them to a CBP processing center in Weslaco. Cardiel testified that Laura wept and told Agent Garza that she feared returning to Mexico because of Sergio.[1]

At the processing center, Agent Garza and another unknown CBP agent fingerprinted and interviewed Laura and Cardiel. Cardiel and Laura were not restrained or handcuffed and were not physically forced to do anything. The officers did not threaten them. Agent Garza had removed his handgun before entering the processing room, but he and the other officers on the floor each retained a taser and a baton.

Cardiel and Morales testified that Laura explained her fears about returning to Mexico and that she was crying and frightened. Cardiel also testified that the CBP agents said they were in a hurry. Laura was able to call her children's grandmother to make "suitable arrangements for [their] care and well-being." Laura asked for an opportunity to get the expired protective order to show the agents and asked to be released. The agents allegedly ignored her comments or

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[1] Agent Garza does not recall being told this. He testified that Laura, Cardiel, and Morales were generally complacent. According to Agent Garza, had Laura told him that she feared returning to Mexico, she would have been given a hearing before an immigration judge.

laughed and told Laura and Cardiel "in high volume voices" that they had to go back to Mexico.

The agents presented Laura with Form I-826. This form included a "Notice of Rights" in Spanish. The notice stated:

> You have been arrested because immigration officers believe that you are illegally in the United States. You have the right to a hearing before the Immigration Court to determine whether you may remain in the United States. If you request a hearing, you may be detained in custody or you may be eligible to be released on bond, until your hearing date. In the alternative, you may request to return to your country as soon as possible, without a hearing.
>
> You have the right to contact an attorney or other legal representative to represent you at your hearing, or to answer any questions regarding your legal rights in the United States. Upon your request, the officer who gave you this notice will provide you with a list of legal organizations that may represent you for free or for a small fee. You have the right to communicate with the consular or diplomatic officers from your country. You may use a telephone to call a lawyer, other legal representative, or consular officer at any time prior to your departure from the United States.

Below this language, the form included a section titled "Request for Disposition." This section offered a list of three options from which an alien must choose:

1. "I request a hearing before the Immigration Court to determine whether or not I may remain in the United States."
2. "I believe I face harm if I return to my country. My case will be referred to the Immigration Court for a hearing."
3. "I admit that I am in the United States illegally, and I believe I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my departure. I understand that I may be held in detention until my departure."

Next to each option was a check-box with an adjacent line for the alien's initials.

Cardiel testified that Laura initially refused to sign the form. The agents allegedly pointed at the form with their fingers and told her she had to sign. Laura eventually wrote an "X" in the check-box for the third option and wrote her initials there. This affirmed her selection of the voluntary return option.[2] Cardiel also selected the voluntary return option, testifying that she felt she "had no choice" because she "didn't want to be locked in because [she had] children."

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[2] "Voluntary return" is a term of art for "administrative voluntary departure," a process whereby an alien can leave the country without formal removal proceedings. *See* 8 U.S.C. § 1229c(a)(1).

Agent Ruben Garcia was the supervisor at the Weslaco facility when Laura was processed. He worked in the "Bubble," a glass tower in the middle of, and overlooking, the processing floor. As supervisor, he ultimately signed Laura's Record of Deportable/Inadmissible Alien form. The plaintiffs claim that the unidentified officer involved in Laura's processing must have been Agent Garcia because standard procedures required requests for assistance to go to the supervisor. Cardiel testified that Agent Garza briefly went into the Bubble, but there was no evidence of communication between Agent Garza and Agent Garcia. Cardiel did not identify Agent Garcia from a photograph.

After all three aliens had elected voluntary return, Agent Garza placed them in a van and drove them to the international Hidalgo-Reynosa Bridge to cross over into Mexico. Cardiel claims that Laura told Agent Garza, "If I am killed, you will carry that in your conscience."

In Mexico, Cardiel accompanied Laura to her grandmother's house. Later in the day, Laura asked Cardiel if there was someone to take her back to the United States because Sergio was looking for her. At some point after this conversation, Cardiel swam the Rio Grande to return to her children in the United States. Laura was murdered by Sergio several days later.[3]

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[3] Before her death, Laura allegedly told a cousin that the CBP agents had "kicked [her] out." The district court discarded the cousin's testimony as hearsay following a thorough analysis.

II. Proceedings Below

Laura's mother, Maria S., filed a *Bivens* action as the next friend of Laura's three surviving minor children, seeking to recover damages from the immigration officers who participated in Laura's removal. Agents Garza and Garcia were ultimately named as the defendants. The defendants filed a motion to dismiss, asserting five separate grounds, including the absence of a *Bivens* cause of action and qualified immunity. The district court denied the motion to dismiss.

Following limited discovery, the defendants moved for summary judgment. The district court granted summary judgement for both defendants. The district court granted summary judgment for Agent Garcia on the basis of qualified immunity and on the merits because the plaintiffs failed to create a fact issue as to whether he acted in any capacity other than a supervisory role at the CBP processing center. Regarding Agent Garza, the court held that the plaintiffs failed to create a fact issue as to whether he actually coerced Laura into selecting the voluntary return option on Form I-826.

The plaintiffs timely appealed.

The plaintiffs' opening brief states in a footnote that the district court erred in this conclusion but provides no explanatory analysis or supporting authority. Accordingly, the plaintiffs have waived any challenge on the hearsay issue. *See N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 183 n.24 (5th Cir. 2003); Fed. R. App. P. 28(a)(9)(A); *L&A Contracting Co. v. S. Concrete Servs.*, 17 F.3d 106, 113 (5th Cir. 1994) (waiver for failing to cite authority).

JURISDICTION AND STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*, applying the same standards as the district court. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 397 (5th Cir. 2010) (en banc). The court views all evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bolton v. City of Dallas*, 472 F.3d 261, 263 (5th Cir. 2006).

This court reviews the grant of qualified immunity *de novo*. *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008). "Our jurisdiction over qualified immunity appeals extends to 'elements of the asserted cause of action' that are 'directly implicated by the defense of qualified immunity[,]' including whether to recognize new *Bivens* claims." *De La Paz v. Coy*, 786 F.3d 367, 371 (5th Cir. 2015) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4, 127 S. Ct. 2588, 2597 (2007) (quoting *Hartman v. Moore*, 547 U.S. 250, 257 n.5, 126 S. Ct. 1695, 1702 (2006))).

DISCUSSION

I. *Bivens*

The district court granted summary judgment on the issue of qualified immunity, but the defendants prevail on an alternative basis: the plaintiffs lack an

implied cause of action under *Bivens*. This court may affirm the district court on any grounds supported by the record and argued in the court below. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 307 (5th Cir. 1997). The defendants' motion to dismiss argued that the plaintiffs lacked a *Bivens* remedy, but the district court rejected this argument. The district court erred as a matter of law.

When the district court addressed the *Bivens* issue, it lacked the guidance of the Supreme Court's recent elucidation of *Bivens* in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). *Abbasi* stressed that any extension of *Bivens* to new factual scenarios is now a "'disfavored' judicial activity." 137 S. Ct. at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S. Ct. 1937, 1948 (2009)). The district court also lacked the guidance of *Hernandez v. Mesa*, this court's en banc application of *Abbasi*. *See* 885 F.3d 811, 823 (5th Cir. 2018) (en banc) (denying a *Bivens* remedy in the context of a CBP agent's cross-border shooting of a Mexican citizen on Mexican soil). In fact, the district court's *Bivens* analysis relied in part on the original panel opinion in *Hernandez*, which extended *Bivens* and which was repudiated by the en banc court.

As explained in *Abassi* and *Hernandez*, there is a two part inquiry for determining whether to allow a *Bivens* cause of action: (1) whether the instant case involves a "new context" that is distinct from prior *Bivens* cases and (2) whether any "special factors" preclude extending *Bivens* to this "new context." 885 F.3d at 816-18.

There is no question that this case involves a "new context," and the district court acknowledged as much. Under *Abbasi*, there is a "new context" whenever a "case is different in a meaningful way" from prior *Bivens* cases. 137 S. Ct. at 1859-61. Neither the Supreme Court nor this court has ever implied a *Bivens* cause of action for a claim that an alien's death in another country was caused by the deprivation of procedural due process by CBP agents in the United States. The context here is new. Accordingly, we turn to the question of whether this case involves any "special factors" that would preclude a *Bivens* remedy.

The "special factors" analysis works to safeguard the separation of powers by asking whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Abassi*, 137 S. Ct. at 1858. If any such reasons—"special factors"—do exist, then "courts *must refrain* from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.* (emphasis added). "Even before *Abbasi* clarified the 'special factors' inquiry, we agreed with our sister circuits that '[t]he only relevant threshold—that a factor "counsels hesitation"—is remarkably low.'" *Hernandez*, 885 F.3d at 823 (quoting *De La Paz v. Coy*, 786 F.3d 367, 378 (5th Cir. 2015) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (en banc))). The circumstances of this case exceed this "remarkably low" bar; there are several "special factors" that counsel against extending a *Bivens* remedy to this "new context."

The comprehensive federal regulations governing immigration and the removal process weigh against creating a damages remedy in this context. As this court held in *De La Paz v. Coy*, "[d]espite its repeated and careful attention to immigration matters, Congress has declined to authorize damage remedies against individual agents involved in civil immigration enforcement. The institutional silence speaks volumes and counsels strongly against judicial usurpation of the legislative function." 786 F.3d at 377. In *De La Paz*, we refused to extend a *Bivens* cause of action to claims of unlawful arrest brought against CBP agents by illegal aliens. *Id.* at 380. Here also the comprehensive administrative and remedial procedures of the Immigration and Nationality Act ("INA") counsel against judicially inventing rights in this area. Under the INA, individuals can challenge the constitutionality of their deportation proceedings and can often seek a stay of deportation or a grant of asylum. *See, e.g.*, *Olabanji v. I.N.S.*, 973 F.2d 1232, 1234-35 (5th Cir. 1992). Thus, if individuals' rights are violated, they will generally have recourse under existing law.[4]

Relatedly, judicial meddling in immigration matters is particularly violative of separation-of-powers principles because the Constitution gives the political branches "broad, undoubted power over the subject of

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[4] The district court distinguished *De La Paz* in large part because the INA's procedures and remedies offer the plaintiffs no "redress for the death of their mother." But, as this court stressed in *Hernandez*, although the existence of a damages remedy usually precludes a *Bivens* extension, the "lack of a damages remedy [does not] favor extending *Bivens*." 885 F.3d at 821.

immigration." *Arizona v. United States*, 567 U.S. 387, 394, 132 S. Ct. 2492, 2498 (2012). Again, as we explained in *De La Paz*, "[l]ack of institutional competence as well as a lack of constitutional authority counsel or demand hesitation by the judiciary in fostering litigation of this sort." 786 F.3d at 379. Intervening here would implicate "concerns that lie at the heart of the 'special factors' concept." *Hernandez*, 885 F.3d at 823.

Creating a damages remedy against CBP agents for any injuries allegedly tied to deprivations of procedural due process during deportation would also "yield a tidal wave of litigation." *De La Paz*, 786 F.3d at 379. One CBP supervisor testified in this case that roughly 95% of all aliens processed at the Weslaco facility choose "voluntary removal." If we were to extend a remedy in this case, any aliens selecting "voluntary removal" on Form I-826 could subsequently sue on the theory that CBP agents coerced their signatures. Many of these claims would involve a he-said-she-said scenario, making them difficult to dismiss on summary judgment and costly to litigate. The danger of such litigation would, in turn, likely force CBP to change policies and procedures, even to adopt excessive precautions to prevent potential liability. Whatever the effect of such changes, the crucial point is that the consideration of policy changes is "for the Congress, not the Judiciary, to undertake." *Hernandez*, 885 F.3d at 821 (quoting *Abbasi*, 137 S. Ct. at 1863).

In sum, the implications of extending a *Bivens* remedy to these circumstances counsel hesitation and so preclude the plaintiffs' cause of action.

II. Qualified Immunity

Although the *Bivens* determination disposes of this case, we also hold that the district court correctly determined that both CBP agents were entitled to qualified immunity. The qualified immunity analysis has two prongs: (1) whether the facts, taken in the light most favorable to the plaintiffs, demonstrate that an officer violated a federal right and (2) whether the right was clearly established at the time of the violation. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). In denying the defendants' motion to dismiss, the district court held that Laura's right to procedural due process in immigration proceedings was clearly established at the time of the violation. Then, on summary judgment, the district court held that the plaintiffs had failed to raise a genuine issue of material fact as to whether this clearly established right was violated.

As to Agent Garcia, there is no need for further analysis because, as the district court found, there is no genuine issue of material fact that he was involved, from his supervisory perch, in any of the proceedings concerning Laura.

As to Agent Garza, however, we need not address the district court's determination that "clearly established" procedural due process law applied to his

conduct when he obtained a consent form signed by Laura S. before her voluntary return. The court granted qualified immunity on the basis that the plaintiffs were unable to proffer evidence creating a genuine issue of material fact as to the objective unreasonableness of the agent's conduct or whether Laura was coerced into signing the form. The "relevant question," as Justice Scalia put it in *Anderson v. Creighton*, "is the objective (albeit fact-specific) question whether a reasonable officer could have believed" his conduct to be lawful in light of clearly established law and the information the officer possessed. 483 U.S. 635, 641, 107 S. Ct. 3034, 3040 (1987).

The district court conducted an exceptionally thorough review of the relevant facts surrounding the detention of Laura S. and found no indication of coercion or inherently unreasonable conduct by Agent Garza. Laura S. and her companion were detained at the standard immigration detention facility in Weslaco, Texas, for about 20-30 minutes. No officer brandished a firearm or weapon at them. She was not handcuffed. Laura S. was familiar with procedures because she had been voluntarily removed to Mexico twice before. Laura S. was literate in Spanish, and the form plainly offered her (in Spanish) the opportunity to remain detained while pursuing formal immigration proceedings. That she was fearful of her husband in Mexico was an extraneous fact not within the control of the officers. She was not overtly coerced. Any impression of the motives of Laura S. in signing a voluntary departure form is necessarily speculation without her

testimony, and she could have had several reasons for her ultimate decision—including a swift departure over the border followed by a swift, stealthy re-entry into the United States

The only evidence of alleged "coercion" found by the district court consisted of the complaints that Agent Garza "mock[ed]" and laughed at Laura S.; pointed "firmly" at the deportation form "in a strong manner;" told her in a loud voice to sign the form; and said she "had to go back to Mexico." But we, like the district court, find this histrionic conduct, even if true, insufficient, without more, to raise a genuine, material fact issue of coercion by Agent Garza. The agent's conduct was not objectively unreasonable. The district court correctly awarded qualified immunity.

For the foregoing reasons, we **AFFIRM** the district court's grant of qualified immunity.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE EDITION

MARIA S., As next friend for E.H.F., S.H.F., and A.S.G., minors, Plaintiffs,	§ § § § § §	CIVIL ACTION NO. 1:13-CV-108.
VS.	§	
JOHN DOE, *et al*, Defendants.	§ § § §	

MEMORANDUM OPINION

(Filed Jul. 21, 2017)

This case presents one of the most lamentable set of circumstances that this Court has ever been called upon to address. A young woman who was living and working in the United States, albeit illegally, who was by all accounts otherwise law abiding and was providing for her family to the best of her ability, was returned to her native Mexico and was soon thereafter killed. No one involved in this matter—not the parties, not the lawyers, and certainly not the Court—has anything but a profound sense of sadness about the disastrous chain of events that ended in the decedent's murder. The Plaintiffs lost their mother, and their family lost an individual whom they, no doubt, cherished and loved.

This is a case in which there will be no winners regardless of which way the Court rules. The parties and the Court are faced with a situation that can only be described as sorrowful: a young woman was killed, her estranged boyfriend has been convicted and jailed, and the survivors are left to deal with what remains. This lawsuit is no doubt part of an attempt to do just that—provide support for the young woman's children and to help provide some sense of closure for all. While those involved must cope with their loss, the law requires that the Court remain objective. The lawyers in this matter have done their best to represent their respective clients. The Court will now address the pending motions, as it must, without bias or sympathy.

I. Procedural History

Pending before the Court is Defendants' Motion for Summary Judgment [Defs.' Mot. For Summ. J., Doc. No. 118], Plaintiffs' Response [Pls.' Resp, Doc. No. 123], Defendants' Reply in Support [Defs.' Reply, Doc. No. 129], and Plaintiffs' Surreply [Pls.' Surreply, Doc. No. 137].

Defendants previously filed a motion to dismiss, which this Court denied. [Memo Op. & Order, Doc. No. 81]. Rejecting the Defendants' argument that Laura Karina Flores Salazar ("Laura S.") had no protected constitutional rights at stake, the Court ruled that Laura S.—though an illegal alien—was entitled to Fifth Amendment protection while in the United States in the custody of Custom [sic] and Border Patrol

("CBP") officials.[1] [*Id.* at 22]. After identifying the clearly established rights at stake, the Court ruled as a matter of law that a waiver of those rights obtained through coercion would not be objectively reasonable in light of clearly established law. [*Id.* at 23].

The Court subsequently allowed limited discovery on the issue of qualified immunity. The Defendants have now filed a motion for summary judgment alleging: (1) that Agent Ruben Garcia ("Agent Garcia") should be granted judgment as a matter of law, (2) that all Defendants are protected by qualified immunity, and (3) that Plaintiffs have not pleaded a legally cognizable claim. [Defs.' Mot. for Summ. J., Doc. No. 118].

The Plaintiffs moved to strike part of Defendants' Motion for Summary Judgment as Plaintiffs believed that Defendants impermissibly moved for summary judgment on the causal link between the Defendants conduct and Laura S.'s murder. [Doc. No. 121]. Among other topics, the Defendants' Motion highlighted the great difficulty Plaintiffs would face in proving that Defendants' behavior was the proximate cause of Laura S.'s death were this suit to proceed past the qualified immunity stage.[2] Nevertheless, the Court

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[1] The Court, while using Laura S. to identify the deceased, notes that in certain testimony she is frequently referred to by her nickname "Karina" and in some places she is referred to as "Laura Flores." Indeed, this is the name she used when signing Form I-826 which lies at the heart of this case.

[2] Defendants' Motion for Summary Judgment referenced several other issues that pertain to this case including (1) whether Laura S.'s death in Mexico at the hands of a private actor is a cognizable due process violation, (2) whether a special

denied the motion to strike, clarified that the sole issue before the Court on summary judgment would be qualified immunity, and explained that the Court would only consider those parts of the pleadings that relate to the issue of qualified immunity. [Doc. No. 122]. Consistent with that order, the Court will consider only the issues related to qualified immunity that have been raised in Defendants' Motion for Summary Judgment. The Court waited on the United States Supreme Court to rule in the cases of *Hernandez v. Mesa*, ___ U.S. ___, 15-118, 2017 WL 2722409 (U.S. June 26, 2017) and *Ziglar v. Abbasi*, ___ U.S. ___, 15-1358, 2017 WL 2621317 (U.S. June 19, 2017) as both cases contained issues which could have impacted this case. The Supreme Court released both cases during the last two

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relationship between the decedent and Defendants existed and whether there was a "state created danger," and (3) whether there is extraterritorial application of the Fifth Amendment. This order does not address these issues as none of these issues were actually grounds raised as a basis for the summary judgment requested by the Defendants in their motion (although they were argued in detail in their responsive pleading). These issues were not only inappropriately referenced, but also are beyond the scope of the immunity issue that was the limited issue specified by prior orders of this Court. That being said, inextricably intertwined with the question of whether a triable issue of fact exists with regard to the immunity defense is whether Agent Garcia actually, personally violated Laura S.'s rights. Therefore, though perhaps technically distinct from the qualified immunity analysis, the Defendants have properly raised the issue of whether Plaintiffs may even sustain a suit against Agent Garcia pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

weeks of its term leaving no impediment to this Court's ruling.

II. Factual Background

While most of the key facts are in dispute, some facts are either agreed to or conceded for purposes of this Motion. The Plaintiffs in this case are the three surviving children of Laura S. Laura S. was born in Mexico, and despite having no legal status in the United States, lived here at various times in her life. For many years, Laura S. suffered physical abuse at the hands of her then boyfriend and the father of two of the Plaintiffs, Sergio Misael Hernandez ("Sergio H."). In 2008, Sergio H. threatened to kill Laura S. In response, Laura S.—fearing for her life—obtained a protective order against Sergio H. from a municipal court in McAllen, Texas.[3] At some point, prior to the key events covered by this Motion, Sergio H. returned to Mexico and was allegedly working for a drug cartel.

Though Sergio H.'s physical proximity was no longer a problem for Laura S. given that she remained in the United States (albeit illegally), Plaintiffs claim that Sergio H. still posed a danger to her as he threatened Laura S. that he would kill her if he ever saw her again. According to Plaintiffs, Laura S. was worried

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[3] Plaintiffs have attached a copy of the protective order to their response. [Pls.' Ex. 14, Doc. No. 124–14 at 2]. The Defendants have pointed out that the protective order expired on June 12, 2008, nearly a year before the incident motivating this lawsuit occurred. [*See id.*]

that Sergio H. would follow through on his threat and murder her if she was deported to Mexico. The claims at bar result from the events preceding Laura S.'s death, while she was in CBP custody at CBP's processing center in Weslaco, Texas.

On the early morning of June 8, 2009, Laura S. was driving a car near Pharr, Texas with three passengers: her cousin Elizabeth Alvarez ("Alvarez") and friends Arturo Morales ("Morales") and Saray Cardiel ("Cardiel"). The four were allegedly on their way to a popular 24-hour hamburger restaurant around 2:00 AM when they were stopped by a police officer for a driving infraction. The officer asked the four passengers for proof of citizenship or immigration status. Alvarez had a "laser visa" which allowed her to legally cross back and forth from Mexico and the United States.[4] Laura S., Cardiel, and Morales were unable to satisfy the officer's request, and the officer subsequently notified CBP. According to Plaintiffs, Laura S., fearing deportation, began to weep and told the officer that Sergio H. would harm her if she was forced to return to Mexico.

The officer released the group, minus Alvarez, to Agent Ramiro Garza, a CBP agent ("Agent Garza"). Since Laura S. had been driving the vehicle when stopped, Alvarez stayed behind with the police officer

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[4] A "laser visa" or Border Crossing Card is a laminated card the size of a credit card which allows Mexican citizens to cross into the United States. U.S. Dep't of State, Bureau of Consular Affairs, *Border Crossing Card*, https://travel.state.gov/content/visas/en/visit/border-crossing-card.html (last visited July 7, 2017).

and waited for her mom and aunt to pick her up. Laura S. apparently told Agent Garza a similar story—that she feared returning to Mexico because of Sergio H. and that she needed additional time to produce her protective order. Agent Garza placed Laura S., Cardiel, and Morales in his vehicle, and transported them to a CBP processing center in Weslaco, Texas. Laura S. allegedly continued to weep, plead, and beg for release during the entire ride to the CBP processing center.

Agent Garza, Agent Garcia, and other unknown CBP agents processed Laura S., Cardiel, and Morales with varying degrees of involvement. Morales was processed separately from Laura S. and Cardiel. Agent Garza and another CBP agent fingerprinted and interviewed Laura S. and Cardiel and presented each of them with a Form I-826. This form requires an illegal alien to make a choice from three options, one of which results in voluntary return to one's country of origin.[5]

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[5] Voluntary return is a term of art denoting "administrative voluntary departure," a process by which an alien may be removed prior to and in lieu of removal proceedings. *See* 8 U.S.C. § 1229c (a)(1). Voluntary return is conducted by either a CBP officer or an officer for Immigration and Customs Enforcement ("ICE") and it allows certain aliens to return to their home country voluntarily by requesting such on Form I-826. *See, e.g., Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619 (9th Cir. 2006). Voluntary departure, though also authorized by 8 U.S.C. § 1229c and often times referred to interchangeably as voluntary return, refers to an entirely different removal process. Voluntary departure denotes a form of removal relief granted during the conclusion of removal proceedings under 8 U.S.C. § 1229a whereby an alien chooses to depart the United States voluntarily rather than through formal removal pursuant to an order of an immigration

Laura S. reviewed and signed the Spanish version of Form I-826. [*See* Defs.' Ex. 2, Doc. No. 119–2 at 4].

Form I-826 includes a "Notice of Rights."[6] The Court quotes the translation included as part of the summary judgment evidence. Form I-826 states in part:

> You have been arrested because immigration officers believe that you are illegally in the United States. You have the right to a hearing before the Immigration Court to determine whether you may remain in the United States. If you request a hearing, you may be detained in custody or you may be eligible to be released on bond, until your hearing date. In the alternative, you may request to return to your country as soon as possible, without a hearing.
>
> You have the right to contact an attorney or other legal representative to represent you at your hearing, or to answer any questions regarding your legal rights in the United States. Upon your request, the officer who gave you this notice will provide you with a list of legal organizations that may represent you for free or for a small fee. You have the right to

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judge. *See, e.g.*, *Rosario-Mijangos v. Holder*, 717 F.3d 269, 279 (2d Cir. 2013).

[6] The record includes an affidavit attesting to the accurate translation of the English version of Form I-826 into Spanish. [Defs.' Ex. 2, Doc. No. 119–2 at 6]. The affidavit was sworn before a notary public in Cook County, Illinois on February 5th, 2014. [*Id.*] It is unclear from the record who the affiant was. No party has disputed the accuracy of the translation.

> communicate with the consular or diplomatic officers from your country. You may use a telephone to call a lawyer, other legal representative, or consular officer at any time prior to your departure from the United States.

[*Id.* at 5] (emphasis added).

Under the "Notice of Rights" section on Form I-826 is a section titled "Request for Disposition." This section offered Laura S., as with all similarly situated immigrants, a choice of three options: (1) request a hearing before the immigration court to determine whether she could stay in the United States, (2) indicate that she believed that she would be harmed if she returned to Mexico and have her case referred to the immigration court, or (3) acknowledge her unlawful presence and be repatriated to Mexico. [*See id.*] The options were presented to her in a list format and separately delineated. [*See id.*] Next to each option is a checkable blank box designed to show the selection of one option to the exclusion of the others. [*See id.*] Adjacent to the blank box for each of the three options is a corresponding blank line for the alien to initial the selected option. [*See id.*] The first two options offer the opportunity to remain in the United States pending a hearing (although one might have to remain in custody). The third choice obviously results in one being repatriated back to one's home country.

Laura S. placed an "x" in the box corresponding to the voluntary return option and initialed on the line next to the checked box affirming her selection. [*See id.* at 4]. Laura S.'s full signature also appears under her initials, along with the date on which she signed. [*See id.*] The actual form Laura S. signed follows in its entirety:

U.S. Department of Homeland Security

Notificación de Derechos y Solicitud de Resolución

Subject ID:280232470 Event No:MER0906000073

FINS #:11597033 Expediente No: _____

Nombre: FLORES-SALAZAR, LAURA KARINA

NOTIFICACIÓN DE DERECHOS

Usted ha sido detenido porque los oficiales de Inmigracion opinan que se encuentra en os Estados Unidos ilegalmente. Tiene derecho a una audiencia ante el Tribunal de Inmigración, con el fin de decidir si puede permanecer en los Estados Unidos. En el caso de que Usted solicite esa audiencia, pudiera quedar detenido o tener derecho a la libertad bajo fianza hasta la fecha de la audiencia.Tiene la opción de solicitar el regreso a su pais a la brevedad posible, sin que celebre la audiencia.

Usted tiene derecho a comunicarse con un abogado u otro representante legal para que lo represente en la audiencia, o para responder a cualquier pregunta acerca de sus derechos conforme a la ley en los Estados Unidos. Si Usted se lo pide, ese funcionario que le haya entregado esta Notificación le dará una lista de las asociaciones juridicas que podrían representarlo gratuitamente o a poco costo. Tiene derecho a comunicarse con el servicio consular o diplomatico de su país. Puede usar el teléfono para llamar a un abogado, o a otro representante legal, o a un funcionario consular en cualquier momento anterior a su salida de los Estados Unidos.

SOLICITUD DE RESOLUCIÓN

_____ ☐ Solicito una audiencia ante el Tribunal de Inmigración que resuelva si puedo o no permanecer en los Estados Unidos.
Iniciales

_____ ☐ Considero que estaria en peligro si regreso a mi pais. Mi caso se trasladara al Tribunal de Inmigración para la celebración de una audiencia.
Iniciales

LF ☒ Admito que estoy ilegalmente en los Estados Unidos, y no considera que estaría en peligro si regreso a mi país. Renuncio a mi derecho a una audiencia ante el Tribunal de Inmigración. Deseo regresar a mi país en cuanto se pueda disponer mi salida. Entiendo que pudiera permanecer detenido hasta mi salida.
Iniciales

Laura Flores
Firma del sujeto

6/9/09
Fecha

CERTIFICATION OF SERVICE

☐ Notice read by subject

☒ Notice read to subject by RAMIRO GARZA, in the SPANISH language.

RAMIRO GARZA
Name of Immigration Officer (Print)

Name of Interpreter (Print)

Signature of Officer

June 09, 2009 04:03 AM
Date and Time of Service

Form I-826 (06/01/07) N

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[*Id.*] Laura S. had been repatriated to Mexico before in 2002 and 2005, and allegedly signed nearly identical forms in 2002 and 2005, selecting the voluntary return option both times.[7] [*See* Defs.' Ex. 3, Doc. No. 119–3 at 4; Defs.' Ex. 4, Doc. No. 119–4 at 4].

According to Plaintiffs, after being presented with Form I-826, Laura S.—weeping, visibly frightened, and anguished—told the agents that Sergio H. had long battered her and that she had a protective order against him. The agents allegedly ignored Laura S.'s fears about returning to Mexico. As claimed by Plaintiffs, Laura S. told the agents that Sergio H. would kill her if she returned to Mexico, but the agents ordered Laura S. and Cardiel to sign Form I-826 anyways. Laura S. apparently twice refused to sign the form, and at one point, frustrated with her circumstances, described them as "an injustice." Both Laura S. and Cardiel each eventually signed an I-826.

Agent Garcia was a supervisor the morning Laura S. was processed. The extent of Agent Garcia's involvement with Laura S. is disputed. Plaintiffs allege that

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[7] Laura S.'s actual signature does not appear on the I-826 forms she "signed" in 2002 and 2005 that are in the record. [Defs.' Ex. 3, Doc. No. 119–3 at 4; Defs.' Ex. 4, Doc. No. 119–4 at 4]. According to the affidavit of Robert M. Duff, a division chief at CBP, CBP did not retain the signed versions of Laura S.'s documents and retrieved duplicate copies of the official record, attached as Defendants' Exhibit 3 & 4, from CBP's processing system. [Doc. No. 119–3 at 6; Doc. No. 119–4 at 6]. The duplicate copies reflect the information that was electronically inputted at the time Laura S. was processed for voluntary return in 2002 and 2005. [*Id.*] The Plaintiffs do not contest the accuracy of either form.

he was personally involved in the violation of Laura S.'s constitutional rights. According to Defendants, Agent Garcia had little to no involvement outside of a high-level supervisory level function, and it is questionable as to whether Agent Garcia even interacted with Laura S. on the day she was processed.

After Laura S., Cardiel, and Morales each chose the voluntary return option and signed Form I-826, Agent Garza drove them to the Hidalgo-Reynosa Bridge in Hidalgo, Texas to return the group to Mexico. Laura S. allegedly continued to express her fear of the danger she believed awaited her in Mexico. After crossing the bridge in the early morning, Laura S. went to her grandmother's house in Reynosa, where she eventually reunited with Alvarez. Alvarez claims that Laura S. was trying to raise enough money to return to the United States with the assistance of coyotes, or human traffickers. Tragically, Sergio H. murdered Laura S. a few days later.

III. Legal Standard

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)). Once a movant

submits a properly supported motion, the burden shifts to the non-movant to show that the court should not grant the motion. *Celotex Corp.*, 477 U.S. at 321–25.

The non-movant then must provide specific facts showing that there is a genuine dispute. *Id.* at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must draw all reasonable inferences in the light most favorable to the nonmoving party in deciding a summary judgment motion. *Id.* at 255. The key question on summary judgment is whether a hypothetical, reasonable factfinder could find in favor of the nonmoving party. *Id.* at 248. Since the question on a possible appeal is whether the Plaintiffs have presented evidence that creates an issue of material fact, this opinion concentrates sometimes to the point of repetition on the factual presentation.

IV. Analysis

A. Is There Evidence That Raises a Material Fact Issue as to Whether Agent Garcia Violated Laura S.'s Constitutional Rights?

Agent Garcia argues that he is entitled to summary judgment against Plaintiffs' claims because Plaintiffs have not shown that he personally violated Laura S.'s constitutional rights. The Court considers

this separately from Agent Garcia's possible entitlement to the defensive shroud of qualified immunity. Obviously if there is no evidence of wrongful conduct, there would be no question that Agent Garcia is entitled to immunity. Agent Garcia claims that Plaintiffs have not produced any evidence suggesting any personal interaction with Laura S., much less any wrongful conduct, and are instead attempting to sue Agent Garcia on a legally impermissible theory of *respondeat superior* liability.

"[I]ndividual government officials cannot be held liable in a *Bivens* suit unless they themselves acted unconstitutionally." *Wood v. Moss*, 134 S. Ct. 2056, 2070 (2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009)) (internal quotation marks omitted). A plaintiff can not rely on *respondeat superior* liability when bringing a *Bivens* suit against an individual government official. *Iqbal*, 556 U.S. at 683. This concept was recently reaffirmed by the Supreme Court in *Ziglar*: "The purpose of *Bivens* is to deter the *officer* . . . *Bivens* is not designed to hold officers responsible for acts of their subordinates." 2017 WL 2621317, at *16 (internal citations omitted). A supervisory federal official may be held liable only upon two bases: (1) personal involvement in the acts causing the constitutional violation or (2) if the official implements a policy so deficient that the policy itself acts as a deprivation of constitutional

rights.[8] *Cronn v. Buffington*, 150 F.3d 538, 544 (5th Cir. 1998).

Defendants argue that though Agent Garcia was a supervisor at the CBP processing center in Weslaco the morning Laura S. was processed, there is no evidence that he personally violated Laura S.'s constitutional rights. In his capacity as a processing supervisor, Agent Garcia was responsible for working on employee schedules and performance ratings, monitoring the radio, and serving as a direct supervisor to Agent Garza, among others. [Garcia Dep. 49:13–16, 57:16–18, 50:10–11, Apr. 20, 2016]. Agent Garza and other CBP agents would therefore direct any questions or problems they had in processing an individual to Agent Garcia on the morning Laura S. was processed. [*See* Garcia Dep. 119:19–25; Garza Dep. 81:17–19, 93:3–9, 100:23–25, 101:1–3, Apr. 21, 2016].

It is undisputed that Agent Garcia signed off on Laura S.'s Record of Deportable/Inadmissible Alien form (Form I-213).[9] [*See* Defs.' Ex. 2, Doc. No. 119–2 at 1]. Nevertheless, Agent Garcia swears that, though it was possible that he was at some time actually in

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[8] There is no suggestion that Agent Garcia was the author of or in any way implemented a policy that deprived anyone of their constitutional rights.

[9] "The Form I–213 is essentially a recorded recollection of a conversation with the alien. . . ." *Bustos–Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990). Agent Garza completed the "narrative" portion of Form I-213 in which he described, among other things, how Laura S. was apprehended and why she was in the United States illegally. [*See* Defs.' Ex. 2, Doc. No. 119–2 at 2].

Laura S.'s presence, he can not remember if he actually was or was not. [Garcia Dep. 116:20, 121:1–3]. Agent Garcia's post was physically located in a separate room from the area where Laura S. was processed. [*Id.* at 52:18–20, 65:5–8, 169:21–24].

The Plaintiffs do not provide any summary judgment evidence directly linking Agent Garcia to Laura S.'s processing aside from his signature on the I-213 form. Instead, Plaintiffs point out that Cardiel and Morales observed other CBP agents in Laura S.'s presence apart from Agent Garza, and that if Laura S. were to have expressed a fear of returning to Mexico, and if the CBP agents had followed the normal routine, they would have involved Agent Garcia in his role as a processing supervisor. [Cardiel Dep. 47:25, 48:1, Apr. 13, 2016; Morales Dep. 27:13–17, Nov. 7, 2013; Garza Dep. 157:19–21].

The testimony of Agents Garcia and Garza provide that if a detainee indicated a fear of returning to Mexico, or made a commotion, that the processing supervisor would get involved. [Garza Dep. 189:22–25, 190:3–4; Garcia Dep. 83:15–23, 87:8–14, 88:3–6, 16–25]. The Plaintiffs argue that because Agent Garcia was the on-duty supervisor the morning Laura S. was detained and there is witness testimony to the effect that multiple officers interacted with Laura S., the standard practice of supervisory involvement in processing a detained alien who expresses a fear of returning leads to the conclusion that Agent Garcia personally violated Laura S.'s constitutional rights. This is, at best, speculation.

The Plaintiffs have not provided any evidence suggesting that Agent Garcia actually, *personally* violated Laura S.'s constitutional rights or had any contact with her at all. Even given the most charitable interpretation, they have identified Agent Garcia's presence as a supervisor who *should* have, under the facts as they interpret them, interacted with Laura S—but this is no proof Agent Garcia did. Cardiel and Morales testified that there was more than one CBP agent in the processing center, yet could not identify any one of the other agents aside from Agent Garza. [*See* Morales Dep. 30:1–16, 31:1–6; Cardiel Dep. 41:16–18]. Cardiel could not even identify Agent Garcia when shown his photograph. [Cardiel Dep. 77:23–25, 78:1–22]. The Plaintiffs' sole focus is derived from Agent Garcia's potential involvement through his role as a supervisor.

The Plaintiffs have the burden of creating a contested fact issue for the eventual factfinder. Here, Agent Garcia admits that it was "possible" that he was at some point in time in Laura S.'s presence. [Garcia Dep. 121:1–3]. Nevertheless, the leap to establishing a constitutional violation on Agent Garcia's part is far too tenuous. There is no evidence that Agent Garcia was one of the agents who allegedly violated Laura S.'s constitutional rights. The Court can not, without evidence, on a motion for summary judgment, assume Plaintiffs' preferred chain of events.

The Plaintiffs' evidence falls short of linking Agent Garcia to any constitutional violation of Laura S.'s rights. At most, the Court is left with a two-step hypothetical: that (1) Agent Garcia should and would have

been called into the processing area after Laura S. expressed a fear of returning to Mexico, and (2) once there, that Agent Garcia personally violated Laura S.'s constitutional rights. The fact that he should have been brought into the processing area at some point, even if true, does not create the disputed issue of fact necessary to maintain a *Bivens* suit against Agent Garcia. As there is no competent evidence before the Court that Agent Garcia had any involvement in any alleged violation of Laura S.'s rights, it is not necessary to discuss in detail if a triable issue of fact exists as to whether Agent Garcia acted in an objectively unreasonable manner for purposes of the qualified immunity analysis. He is entitled to judgment both on the merits and on the issue of qualified immunity. Agent Garcia's Motion for Summary Judgment is granted.

B. Is Agent Garza Entitled to Qualified Immunity?

As discussed earlier, the Court denied the Defendants' Motion to Dismiss for failure to state a claim in regard to Defendants' qualified immunity defense. The Court ruled, as a matter of law, that Laura S. was entitled to Fifth Amendment due process protections in the deportation process. [Memo Op. & Order, Doc. No. 81 at 22]. The Court also held, from the totality of the circumstances alleged in Plaintiffs' Complaint, that Agent Garza was not entitled to a Rule 12(b) dismissal due to the qualified immunity defense. [*Id.* at 24]. Due to this ruling, the Court allowed limited discovery to uncover only those facts the parties needed in order to

address the immunity claim. [Memo Op. & Order, Doc. No. 115 at 3]. With respect to Agent Garza, the sole issue presented regarding the applicability of the qualified immunity defense on summary judgment is whether a contested issue of fact exists as to whether Laura S. was coerced into choosing to return to Mexico.

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The concept of qualified immunity has broad application to officers acting in their official capacity. The Supreme Court has summarized its reach by saying it applies to and protects "all but the plainly incompetent or those who knowingly violate the law." *Ziglar*, 2017 WL 2621317, at *24 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1988)). Determining whether a government official may be clothed in the defense of qualified immunity involves a two-step process in a 12(b) context. "First, a court must decide whether a plaintiff's allegation[s], if true, establishes a violation of a clearly-established right." *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 879 (5th Cir. 2004). Second, "a court must decide whether the conduct was objectively reasonable in light of clearly established law at the time of the incident." *E.A.F.F. v. Gonzalez*, 600 Fed. Appx. 205, 209 (5th Cir. 2015), *cert. denied*, 135 S. Ct. 2364 (2015). A defendant's assertion of qualified immunity "alters the usual . . . burden of proof." *Trent v. Wade*, 776 F.3d 368,

376 (5th Cir. 2015) (quoting *Brown v. Callahan*, 623 F.3d 249, 253) (5th Cir. 2010)). In the summary judgment context, the plaintiff thus bears the burden of proof to show a genuine and material factual dispute as to whether the official is entitled to qualified immunity. *Id.*

"Immunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis deleted). Where there remain disputed issues of material fact related to immunity, the jury, if properly instructed, may decide the question. *Snyder v. Trepagnier*, 142 F.3d 791, 800 (5th Cir. 1998) (quoting *Presley v. City of Benbrook*, 4 F.3d 405, 410 (5th Cir. 1993)) (internal quotation marks omitted). The denial of a motion for summary judgment based on qualified immunity is immediately appealable under the collateral order doctrine to the extent that it turns on an issue of law. *Flores v. City of Palacios*, 381 F.3d 391, 393 (5th Cir. 2004) (quoting *Mitchell*, 472 U.S. at 530) (internal quotation marks omitted).

1. Review of the Summary Judgment Evidence and Legal Objections

As stated earlier, this Court has already held that Laura S. had clearly established rights governed by the United States Constitution. Though the Court

previously ruled Laura S. was entitled to Fifth Amendment protections which would include an immigration hearing if requested, [Memo Op. & Order, Doc. No 81 at 9], "due process rights, including the right to a hearing, can be waived." *See United States v. Cordova-Soto*, 804 F.3d 714, 720 (5th Cir. 2015). While due process rights may be waived, any waiver must be done knowingly and voluntarily. *McCarthy v. Mukaskey*, 555 F.3d 459, 462 (5th Cir. 2009). In analyzing whether a waiver was made knowingly and voluntarily, courts "must indulge in every *reasonable* presumption against a waiver." *Nose v. Attorney Gen. of U.S.*, 993 F.2d 75, 79 (5th Cir. 1993) (emphasis added). The constitutional sufficiency of the procedures required by due process differs with the circumstances of each individual case. *United States v. Benitez-Villafuerte*, 186 F.3d 651, 656 (5th Cir. 1999). The "full range of constitutional protections available to a defendant in a criminal case are not afforded an alien in a deportation proceeding." *Id.* at 657.

For purposes of this Motion, the key issue is whether Laura S. was coerced into choosing the voluntary return option. Agent Garza argues that he is entitled to qualified immunity because there is no competent summary judgment evidence that Laura S. was coerced into opting for a voluntary return to Mexico. The Court will first summarize the summary judgment evidence provided by both parties and resolve the evidentiary objections raised. Next, though this necessarily entails some repetition, the Court will next [sic] determine whether an issue of fact exists as to whether

Laura S. knowingly signed Form I-826 and finally it will decide if a fact issue exists as to whether Laura S. voluntarily signed the form. Obviously, due to the death of Laura S., the primary witnesses are the two defendants, and Alvarez, Cardiel, and Morales. All have been deposed, and their depositions are part of the summary judgment record.

i. Alvarez

Elizabeth Alvarez, Laura S.'s cousin, had known Laura S. for her entire life. [Alvarez Dep. 9:1–5, Oct. 23, 2015]. When asked to describe her relationship with Laura S., Alvarez responded that they were best friends. [*Id.* at 9:14–16]. Alvarez was aware of Laura S.'s violent history with Sergio H. and of the protective order Laura S. obtained against Sergio H. [*See id.* at 11:1–25, 12:11–25]. Alvarez was with Laura S., Morales, and Cardiel when they were first apprehended by the police officer. [*Id.* at 15:15–21]. When the police officer informed the group that he was going to call an immigration officer, Alvarez stated that Laura S. told him not to do so because she was scared of being killed in Mexico. [*Id.* at 16:6–18]. Laura S. told the police officer that Sergio H. was working for Mexican cartels and that he would be able to follow through on his threat to kill her if she returned. [*Id.*] Laura S. asked the police officer to wait so she could prove that she had a protective order against Sergio H. [*Id.* at 16:19–24].

When Agent Garza arrived, according to Alvarez, Laura S. began to cry, tremble, and shake. [*Id.* at 17:15–17]. Laura S. told Agent Garza that Sergio H. had threatened her life, that she did not want to be deported, and asked for additional time to get a copy of her protective order. [*Id.* at 17:14–22]. Alvarez testified that Laura S. informed Agent Garza that her youngest child needed to undergo a medical operation and that Laura S. had to be in the United States for the procedure. [*Id.* at 18:7–10, 22:11–12]. As Laura S. spoke Spanish, Alvarez translated the message to Agent Garza in English to make sure he understood Laura S.[10] [*Id.* at 5:22–25]. According to Alvarez, in response to Laura S.'s pleas, Agent Garza just laughed. [*Id.* at 17:22–25]. Alvarez had a laser visa, but the rest of the group was undocumented, and Alvarez watched as Agent Garza loaded Laura S., Cardiel, and Morales into his vehicle. [*See id.* at 18:14–16]. Alvarez testified that Laura S. was crying the entire time. [*Id.*] Alvarez stayed behind, waiting for her aunt and mother to pick her up as Agent Garza took Laura S., Cardiel, and Morales to the CBP processing center. [*Id.* at 18:21–23].

Alvarez reunited with her cousin the next morning, after Laura S. had been repatriated back to Mexico, at their grandmother's house in Reynosa. [*Id.* at 19:10–12]. Alvarez testified that in front of their

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[10] Agent Garza is fluent in Spanish. [Garza Dep. 9:14–16]. Alvarez testified that she translated for Laura S. so that there would be "no doubt" that Agent Garza understood what Laura S. was saying. [Alvarez Dep. 5:22–25].

grandmother and other people,[11] Laura S. acted "normally." [*Id.* at 19:15–17]. Once Alvarez and Laura S. were alone, however, Laura S. acted scared, was shaking and smoking cigarettes, and seemed desperate. [*Id.* at 19:15–19, 21:1–4]. The "first thing" that Laura S. said to Alvarez when they were alone was that "[t]hose assholes threw me out."[12] [*Id.* at 19:20–22]. Alvarez testified that Laura S. was seeking to cross the border again to get out of the reach of Sergio H. but would need the help of "coyotes," or border smugglers. [*Id.* at 21]. Before Laura S. was killed, she was trying to save enough money to get back over the border, an amount Alvarez testified could cost around $1,500. [*Id.*]

Agent Garza objects to this portion of Alvarez's testimony on hearsay grounds. Alvarez, though initially apprehended with Laura S., was not processed with Laura S. Instead, Alvarez visited Laura S. at their grandmother's house after she returned to Mexico. The testimony Agent Garza singles out is Alvarez's recounting of her conversation with Laura S. about the events at the CBP processing center in Weslaco when

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[11] It is unclear from the deposition testimony who these other people were. The deposition transcript reflects that Alvarez testified that she met Laura S. in front of her grandmother and an "agent" at the house in Reynosa, but later clarified upon being questioned by counsel that she had not said "agent," but instead had said in Spanish "gente," or "people." [Alvarez Dep. 19:15, 20:7–14].

[12] As Laura S. was not an English speaker, Alvarez translated Laura S.'s original remarks in her deposition testimony. The word Laura S. originally used to describe the agents who processed her at the CBP center in Weslaco was "pendejos." [Alvarez Dep. 19:21–22].

the pair reunited at their grandmother's house in Reynosa.

At first, in front of Alvarez, their grandmother and other unidentified people, Laura S. acted "normally." [*Id.* at 19:15–17]. Once, alone with Alvarez, Laura S. began to shake, and was scared and desperate.[13] [*Id.* at 19:15–19, 21:1–4]. Alvarez then testified that she heard Laura S. exclaim: "[t]hose assholes threw me out!" [*Id.* at 19:20–22]. The Defendants argue that the latter portion of this statement is offered for the truth of the matter asserted (that Laura S. was thrown out against her will), and that the statement does not fall into any applicable hearsay exception. The proponent of hearsay evidence bears the burden of proving the applicability of an exception. *United States v. Fernandez-Roque*, 703 F.2d 808, 812 (5th Cir. 1983).

Plaintiffs contend that Laura S.'s statement qualifies as a present sense impression. [Pls.' Resp., Doc. No. 123 at 28]. The present sense impression exception to hearsay provides that a "statement describing or explaining an event or condition, made while or *immediately* after the declarant perceived it" is exempt from the hearsay rule. Fed. R. Evid. 803(1) (emphasis added). The justification for this hearsay exception relies on the contemporaneousness of the event under consideration and the statement describing that event. *Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 280

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[13] Alvarez claims that she had insight into Laura S.'s emotional state because of the way Laura S. was smoking cigarettes. [Alvarez Dep. 21:1–2].

(5th Cir. 1991). Since the event and the statement occur almost simultaneously, there is almost no "likelihood of [a] deliberate or conscious misrepresentation." *Id.* (citations omitted).

The Defendants argue that Laura S.'s statement references the alleged coercive act at issue—the signing of the I-826 form. The Defendants use that point to calculate the time between when Laura S. signed the I-826 form and Laura S.'s statement to Alvarez in Reynosa as being, in the light most favorable to the Plaintiffs, approximately 3.5 hours. [*See* Defs.' Reply, Doc. No. 129 at 18–23]. The Plaintiffs agree that the statements refer to the events at the CBP processing center in Weslaco, [Pls.' Resp., Doc. No. 24 at 28], but argue that the timer should start at the actual time Laura S. was walked back into Mexico rather than the time she was allegedly coerced to sign. [Pls.' Surreply, Doc. No. 137 at 9].

The core dispute between Plaintiffs and Defendants is when the Court should start the clock. Technically, the point when Laura S. waived (allegedly) her right to stay in the United States for additional processing was the point when she completed the I-826 form. If, as Plaintiffs argue, Laura S.'s reference to being "kicked out" also attached to the time when Laura S. crossed the border, there is nothing to suggest that Plaintiffs could not extend the relevant "event or condition" to any point until Laura S.'s murder. While the Court does not perceive this dispute as critical to the overall resolution of the issue presented in this case, in order to resolve it, the Court must draw the line

somewhere. The Plaintiffs could just as easily argue that an identical statement made by Laura S. to Alvarez should fall under the exception if the pair happened to meet a week or two later, when Laura S. was trying to raise money for her return to the United States.

The Plaintiffs seek to use Laura S.'s outburst to establish that the events in the CBP processing center, to which Alvarez was not privy to, included coercion on part of Agent Garza. The Plaintiffs provide the Court with no exact timeline to calculate the time passed between the signing of the waiver form and Laura S.'s statement in Reynosa. Nevertheless, even if the Court were to give Defendants' calculation of the timeline a significant haircut, Laura S.'s statement to Alvarez would not qualify as one made "while or immediately" after Laura S. perceived the event in question. *See United States v. Cain*, 587 F.2d 678, 681 (holding that a statement made 15 minutes after the perceived event did not satisfy Rule 803(1)).

The Plaintiffs also argue that Laura S.'s hearsay statement passes muster under the excited utterance exception. [Pls.' Resp., Doc. No. 123 at 28]. Rule 803(2) provides that a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" is admissible as an exception to hearsay. Fed. R. Evid. 803(2). Unlike the present sense impression exception, the excited utterance exception is not determined solely based on the period of time that elapsed between a statement and the event it references. *United States v. Hefferon*, 314

F.3d 211, 223 (5th Cir. 2002). Instead, under Rule 803(2), the key factor is "spontaneity." Fed. R. Evid. 803(2) Advisory Committee's Note. The statement in question must be spontaneous, excited, or impulsive rather than the product of reflection and deliberation. *United States v. Lawrence*, 699 F.2d 697, 704 (5th Cir. 1983).

Whether a statement qualifies as an excited utterance is a case-by-case determination, but the core focus for the court is the existence of a startling event or condition that provokes the utterance. *See Hefferon*, 314 F.3d at 222 (reviewing treatment of factors such as age, possibility of fabrication, and coaching as relevant to whether a statement qualifies as an excited utterance). Where the court is satisfied that the event in question was such as to cause adequate excitement, the inquiry is ended. 2 K. Broun, McCormick on Evidence § 272 (7th ed. 2013).

Though a sufficient cooling period may preclude a statement from the exited utterance exception, courts have found statements to fall under the exception even when made as far as weeks after the "startling" event in question. *See, e.g., United States v. Napier*, 518 F.2d 316, 317 (9th Cir. 1975) (finding that a statement made by a victim of an assault after looking at a photograph of the assailant nearly eight weeks after the assault was properly admitted under the excited utterance exception because the victim was sufficiently excited by the photograph). As with the present sense impression exception, the proponent of the hearsay evidence bears

the burden of proving the excited utterance exception. *See Fernandez-Roque*, 703 F.2d at 812.

The Defendants argue that Laura S.'s statement to Alvarez was (1) not spontaneous, and (2) was not made while Laura S. was upset about the events at the processing center at Weslaco. [Defs.' Reply, Doc. No. 129 at 33]. In support, Defendants focus on this exchange:

> Counsel: And so I think it makes it pretty clear how she felt, but when she said that to you, "[t]hey threw me out," how did—how was she feeling about being back in Reynosa?
>
> Opposing Counsel: Object to the question. Speculation.
>
> Alvarez: Obviously she felt scared that (Sergio H.) would look for her, find her, and go through with the death threat that he had already made.

[Alvarez Dep. 19:23–25, 20:1–6]. The Defendants argue that Alvarez did not indicate that Laura S.'s fears were inspired by the events in the CBP processing center, but rather Alvarez testified that Laura S.'s fears were motivated by Sergio H. The Plaintiffs respond that first, Defendants ignore the "integrated situation as a whole"—and insist that this Court's analysis should encompass the events at the CBP processing center in Weslaco and the return to Mexico. [Pls.' Surreply, Doc. No. 137 at 8]. The Plaintiffs add that, "in any case," regardless of the precise time of day the two cousins met or how the "event at issue is defined," Laura S. was

under the stress of excitement caused by the events her statement described. [*Id.*]

Whether the Court considers the "integrated situation as a whole" or per Alvarez's deposition testimony looks solely to Laura S.'s excited state at her grandmother's house—Laura S.'s utterance does not fall under the excited utterance exception. An excited utterance must be "impulsive" rather than the product of "reflection or deliberation." *Lawrence*, 699 F.2d at 704. Regardless of whose timeline one believes, the reunion at Laura S.'s grandmother's house was too attenuated for Laura S. to remain in an excited state.

More importantly, Alvarez's testimony, itself, proves that Laura S.'s outburst was not an excited utterance. She avers that while Laura S. was in front of their grandmother, she acted quite "normally." She clearly had the ability to control her emotions and "excitement." Only when they were alone did she express her outrage. This is not an excited utterance. Though the dispositive question before the Court is not the lapse of time between the startling event and the statement, the combination of the cooling off period and Laura S.'s complete composure while in the presence of her grandmother and others establishes that Laura S.'s statement to Alvarez was the product of deliberation and reflection, undercutting the reliability that a "spontaneous" statement would offer per Rule 803(2).

The Plaintiffs, as proponents of the admission of hearsay evidence, have not met their burden to show that Laura S.'s statement to Alvarez related to the

startling event or condition Plaintiffs seek to use the statement to prove—that Laura S. was coerced inside the CBP processing center. The Court agrees with Defendants that Laura S.'s statement to Alvarez as quoted above is inadmissible hearsay.[14] Due to the lack of probative value which one may glean from this statement, this evidentiary ruling, however, is not critical to the issue currently before the Court.

ii Cardiel

Cardiel was with Laura S. from when she, Laura S., Alvarez, and Morales were first apprehended by the police officer near Pharr, Texas. Cardiel was a co-worker and was aware of Sergio H.'s violent history and that Laura S. had a protective order against him. [*Id.* at 22:16–20, 23:15–20]. Cardiel, who was also in

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[14] The Court questions, but does not rule, whether the statement would also be inadmissible under Fed. R. Evid. 403. The probative value is quite minimal (if there is any at all) while the prejudicial effect could be substantial. This statement is the equivalent of an individual sometime after the event complaining that a highway patrolman gave her or him a ticket for speeding. A person might use the same pejorative term to describe the officer, and the fact that one complains about the result is not proof that the ticket was not warranted, nor is it proof that the officer in question was unprofessional. Obviously, the consequences in a deportation scenario are much more serious than in a traffic infraction. Nevertheless, in the instant case, Laura S. was clearly demonstrating her displeasure at being deported, but it is clearly not the case that she was literally "thrown out" of the United States as she left this country by walking across the bridge. The Court does not pre-emptively rule it inadmissible on this ground because Rule 403 contemplates a balancing test, the result of which might change as trial progresses.

the United States illegally, claims that after the police officer called for an immigration officer, Laura S. told the officer that he should not have called. [*Id.* at 30:20–21]. Cardiel testified that Laura S. told the police officer that she had a protective order and that she did not want to go back to Mexico, but Cardiel could not recall whether Laura S. identified Sergio H. as the source of her apprehension. [*Id.* at 31:9–12, 32:6–7].

After Agent Garza arrived, Cardiel testified that Laura S. told Agent Garza over and over again that she did not want to go Mexico because Sergio H. would kill her. [*Id.* at 34:3–10]. While being transported in the CBP vehicle with Laura S. on the way to the CBP processing center, Cardiel stated that Laura S. was crying and weeping and that Laura S. told Agent Garza about her fear of returning to Mexico because of Sergio H. [*Id.* at 36:8–16, 37:4–10]. Once at the CBP processing center in Weslaco, Cardiel testified that she overheard Agent Garza say to an unidentified agent that he was in a rush and that he had to leave.[15] [*Id.* at 43:7–10]. Cardiel averred that Agent Garza and another agent presented the I-826 forms to both Cardiel and Laura S. [*See id.* at 43:14–16]. According to Cardiel, the agents indicated to Laura S. and Cardiel "in a strong" and "ordering" manner that Laura S. and Cardiel "had to go to Mexico." [*Id.* at 43:14–19].

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[15] Cardiel did not testify as to whether Laura S. could have overheard Agent Garza's comment to the unidentified agent about being rushed.

Cardiel testified that Agent Garza and the unknown agent did not yell, but that they used a "high volume voice." [*Id.* at 43:20–22]. Agent Garza and the unknown agent told Cardiel and Laura S. that the agents needed to leave and that they needed to drop off Cardiel and Laura S. at the bridge to Mexico. [*Id.* at 45:1–4]. Laura S. told the agents about her protective order and about her fears of going back to Mexico. [*Id.* at 45:3–20]. According to Cardiel, Agent Garza "mock[ed]" her and Laura S. and told the pair that they "ha[d] to sign." [*Id.* at 45:2–5]. Cardiel testified that the agents looked annoyed. [*Id.* at 43:14–16, 44:22–25].

According to Cardiel, Laura S. refused to sign twice and stated: "this is an injustice." [*Id.* at 45:23–24, 69:16–19.]. Cardiel testified that Agent Garza and the other agent pointed firmly to the signature lines on the I-826 forms and ordered the pair to sign. [*Id.* at 69:9–14]. Cardiel claimed that both she and Laura S. refused to sign the I-826 forms. [*Id.* at 44:25, 45:1–2]. Cardiel averred that Laura S.'s intelligence was "very good" and that Laura S. never indicated to Cardiel that she had any mental disorder. [*Id.* at 24:17–25].

Cardiel gave a number of contradictory reasons why she, herself, eventually signed Form I-826. One explanation was that she signed the form because Agent Garza and the unidentified agent were armed and that she could tell they "wanted to throw [Laura S. and Cardiel] back." [*Id.* at 46:2–5]. Nevertheless, according to Cardiel, the agents had their handguns holstered. [*Id.* at 46:6–8]. Cardiel was unrestrained, was not handcuffed, and was not physically forced to sign the

I-826 form. [*Id.* at 44:1–12]. The agents did not threaten Cardiel or her family. [*Id.* at 44:13–16]. Cardiel testified that she did not think the agents would hurt her if she refused to sign but was instead worried that the agents would "lock [her] in for a long period of time." [*Id.* at 71:1–8]. When asked whether she felt threatened if she did not sign the form, Cardiel answered "[y]es," [*Id.* at 72:22–24].

Asked to clarify the manner in which she felt threatened, Cardiel testified that she felt threatened because she did not want to be locked up on account of her children.[16] [*Id.* at 72:5, 73:1–2] ("I didn't want to be locked in because I [had] children."). When asked whether she signed Form I-826 because it was the fastest way to be released from custody, Cardiel again answered, "[y]es." [*Id.* at 73:3–5]. Cardiel also averred that she and Laura S. signed because they "had no choice," since the agents "didn't tell [them] that [they] could see a judge or anything."[17] [*Id.* at 70:14–22]. Cardiel had prior experience with voluntary return but

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[16] At the time of her deposition, Cardiel had lived illegally in Pharr, Texas for 13 years. [Cardiel Dep. 13:3–17]. Cardiel testified that she lived with her husband, and had five children. [*Id.*] Prior to living in Pharr, she lived in Ciudad Victoria, Mexico. [*Id.* at 18–21]. At the time of the events underlying this suit transpired, Laura S. had three young children living in the United States. [*See* Alvarez Dep. 10:9–18].

[17] Though Cardiel was speculating on Laura S.'s mental state, the Defendants did not object to Cardiel's statement. The Court may only consider admissible evidence for purposes of Defendants' Motion. *See Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995). Nevertheless, the Court can certainly consider the statement for Cardiel's mental state.

averred that she was not made aware of her option to see an immigration judge in 2009. [*Id.* at 72:13–20]. She testified that, in her prior experience with voluntary return, she was told that she could go see an immigration judge. [*Id.* at 71:16–23]. Cardiel testified that she recalled Laura S. at one point saying that she did not want to sign because she did not want to go back to Mexico. [*Id.* at 46:13–16].

After the pair signed the I-826 forms, Agent Garza took Cardiel, Morales, and Laura S. to the Hidalgo-Reynosa Bridge to cross over to Mexico. [*Id.* at 48:5–12]. On the way to the bridge, Cardiel claims that Laura S. told Agent Garza: "If I am killed, you will carry that in your conscience." [*Id.* at 49:6–8]. Cardiel testified that between 20 or 30 minutes passed from the point when officers showed Cardiel the I-826 form and when Cardiel signed the form, though Cardiel estimated that the entire process took about three to four hours. [*Id.* at 47:4–15].

In Mexico, Cardiel accompanied Laura S. to Laura S.'s grandmother's house, but then left Laura S. to go to her relative's house. [*Id.* at 51:2–9]. She met up with Laura S. later that day at a bus station, where Laura S. asked Cardiel if there was someone who could take Laura S. back to the United States because Sergio H. had been looking for her. [*Id.* at 51:8–22]. Cardiel would never see Laura S. again. At some point after her meeting with Laura S., Cardiel swam back to the United States through the Rio Grande river and

returned to her house in Pharr.[18] [*Id.* at 52:14–23]. There, Cardiel received a call from a common friend that Laura S. had been killed. [*Id.* at 54:10–14]. Cardiel paid to swim the river, but could not recall how much she paid. [*Id.* at 52:24–25, 53:1–6]. When asked whether Laura S. could swim, Cardiel could not recall whether Laura S. could or could not. [*Id.* at 53:13–14].

Defendants object to the part of Cardiel's testimony where she was questioned as to the exact reason why she thought Laura S. signed Form I-826. [Defs.' Mot. for Summ. J., Doc. No. 118 at 34]. When Cardiel was asked whether or not she knew why Laura S. signed the I-826 form after refusing to do so two times, she answered "no." [Cardiel Dep. 46:24–25, 47:1–3]. From this exchange, Defendants argue that Cardiel had no personal knowledge as to why Laura S. signed the form.

The Plaintiffs concede that Cardiel can not testify to the exact reason why Laura S. ultimately signed Form I-826. [Pls.' Resp., Doc. No. 123 at 27]. Nevertheless, Plaintiffs argue that Cardiel's value as a witness to show coercion on the part of Agent Garza does not rest on her ability to read Laura S.'s mind. Cardiel was processed simultaneously with Laura S. and can, for the most part, testify to exchanges between Laura S. and the agents and verbal and physical expressions of Laura S.'s mindset. Clearly, Cardiel has sufficient

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[18] Cardiel did not identify exactly which day she swam back to the United States. Cardiel was, however, back in her house in Pharr, Texas before Laura S.'s death. [Cardiel Dep. 53:17–24].

personal knowledge to testify about any events she witnessed at the CBP processing center and to the actions of Agent Garza (or any other agent) that she and Laura S. experienced jointly. The Defendants' objection is overruled as to those events Cardiel personally witnessed.

iii. Morales

Morales was apprehended by the police officer along with Laura S., Cardiel, and Alvarez. Before the police officer called Agent Garza, Morales testified that Laura S. was the only one that looked stressed and that Laura S. told the police officer not to call immigration because of the danger Sergio H. posed in Mexico. [Morales Dep. 19:12–24]. Like Cardiel and Alvarez, Morales testified that Laura S. told Agent Garza that she feared being sent back to Mexico on account of Sergio H. and that she had a protective order against him. [*Id.* at 23:2–15]. According to Morales, Laura S. asked Agent Garza to let her go. [*Id.* at 22:17–19].

In the Weslaco processing center, Morales, though relatively far from Laura S., claimed that he could still hear what Laura S. was saying and could see her in plain sight. [*Id.* at 24:18–25, 25:1]. He testified that while she was being processed, Laura S. sounded frightened, cried, and looked like she was in anguish. [*Id.* at 28:3–12]. Morales testified that Laura S. was begging not to be deported and that she told Agent Garza and the unidentified CBP agent that she feared being killed. [*Id.* at 28:15–16]. Morales testified that an

"anguished" Laura S. continued to beg for release all the way to the bridge. [*See id.* at 31:18–25, 32:1–3, 33:1–2].

The Defendants argue that because Morales did not recall Laura S. signing any form, the Court should discount Morales' testimony about the events at the CBP processing center. [Defs.' Mot. for Summ. J., Doc. No. 118 at 33]. The fact that Morales, himself, did not remember Laura S. signing any documents does not serve to discount the entirety of his testimony—especially when the Court is weighing solely the issue of whether a fact question exists.

iv. The Agents' Testimony

Agent Garza's account of the events at the CBP processing unsurprisingly differs greatly from that of Cardiel, Alvarez, and Morales. Agent Garza testified that though he does not remember "exactly" how the group reacted when he picked them up, he did not think that they were too happy or too upset—more complacent. [Garza Dep. 86:6–9]. He does not recall Laura S. begging him not to send her back to Mexico, crying in the car, mentioning the protective order, or assigning him moral responsibility for her possible death. [*Id.* at 86:6–25, 87:1–5, 96:8–11]. According to Agent Garza, had Laura S. told him that she feared going back to Mexico, she would have seen an immigration judge.[19] [*See id.* at 189:22–25, 190:3–4]. Agent

[19] The Defendants point out that Laura S. had no "right" to a "credible fear" interview under the expedited removal statute

Garza indicates that he had ample time to process Laura S. as he was assigned a shift from midnight to 8:00 AM and had two additional hours of "administratively uncontrollable overtime," pushing his total shift until 10:00 AM. [*Id.* at 70:15–21, 104:18–105:10].

Agent Garcia, the supervisor on duty at the CBP center in Weslaco the morning Laura S. was processed, repeatedly corroborates Agent Garza's testimony. According to Agent Garcia, an alien subject to voluntary return who expressed a fear of return would have their I-826 form marked as such and would be issued a notice to appear to see an immigration judge. [Garcia Dep. 83:15–23, 87: 8–14, 88:3–6, 16–25].

2. Did Laura S. Knowingly Select Removal on Form I-826?

When considering whether Laura S. knowingly waived her right to a deportation hearing the Court must consider: (1) the clarity of the written waiver agreement, (2) whether the party was represented by or consulted with an attorney, and (3) the party's

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through 8 U.S.C.§ 1225 [*See* Defs.' Reply, Doc. No. 129 at 17, 20–21]. "Credible fear" is a term of art used in the context of expedited removal under 8 U.S.C. § 1225. *See* 8 C.F.R. § 235.3(b)(4). Laura S. was not eligible for expedited removal as expedited removal is limited to illegal aliens who have been in the United States for no more than 14 days immediately prior to the date of their encounter with immigration officials. *See* 69 Fed. Reg. 48877-01 (Aug. 11, 2004). The Plaintiffs do not contend that Laura S. fits this category. Nevertheless, Agents Garza and Garcia both testified about the "trigger" that would lead to an eventual hearing before an immigration judge.

background and experience. *Nose*, 993 F.2d at 79. Courts "must indulge in every reasonable presumption against a waiver." *Id.*

i. Clarity of Form I-826

Form I-826, clear and unambiguous by design, is a "relatively simple document." *See O'Hare v. Glob. Nat. Res., Inc.*, 898 F.2d 1015, 1016–17 (5th Cir. 1990) (upholding a claims release where an employee had the experience and training to understand the "plain and unambiguous" release document). Laura S. was a native Spanish speaker. The I-826 form Laura S. was presented with was written in Spanish and clearly set out Laura S.'s rights and options. [*See* Defs.' Ex. 2, Doc. No. 119–2 at 4–5]. A section entitled "Notice of Rights" listed the rights and options provided to Laura S. [*Id.*] It stated that Laura S. had the right to appear before an immigration judge to determine if she could stay in the United States. [*Id.*] Form I-826 gave Laura S. the right to contact an attorney or other legal representative regarding her rights in the United States. [*Id.*] The form also stated that the agency could provide a list of legal organizations upon request. [*Id.*] The form gave Laura S. the right to communicate with a consular, diplomatic officer, lawyer, or legal representative at any time. [*Id.*] This factor clearly favors the Defendants' position.

ii. Whether Laura S. Was Represented by or Consulted with an Attorney

Laura S. was not represented by an attorney. Although the I-826 form indicated that Laura S. would be provided a list of legal organizations upon request, there is no evidence that Laura S. asked to contact an attorney. Since Laura S. was processed before dawn, there is little chance an attorney would have been immediately available to her had she requested one at the time. Of course, had she requested one, she would have been held in custody, at least until one arrived. There is no evidence that Laura S. requested an attorney or that any party prevented Laura S. from obtaining an attorney. This factor does not favor either side. Clearly, given the fact that this encounter occurred after 2:00 in the morning, an attorney was not immediately available. Nevertheless, it is equally clear that Laura S. did not request one.

iii. Laura S.'s Background and Experience

The morning in question was not the first time that Laura S. had seen Form I-826. Laura S. was presented with Form I-826 in both 2002 and 2005, resulting in her repatriation to Mexico both times. [*See* Defs.' Ex. 3, Doc. No. 119–3; Defs.' Ex. 4, Doc. No. 119–4]. She chose the voluntary return option both times. [*Id.*] Cardiel testified that Laura S.'s intelligence was "very good," and Cardiel's testimony indicates that Laura S. knew that signing Form I-826 would lead to her removal to Mexico, [*See* Cardiel Dep. 46:10–12], a detail that Plaintiffs readily admit. [Pls.' Resp., Doc. No. 123

at 29]. There is no evidence that Laura S. could not read or understand Form I-826, a form nearly identical to the ones she was presented with in 2002 and 2005. Furthermore, the evidence is undisputed that she had ample time to read and consider it, and that she knew the effect of the box she checked. This factor clearly favors the Defendants.

iv. Totality of the Circumstances

The Plaintiffs argue that even if Laura S. had signed a voluntary return form before, circumstances were different for Laura S. in 2009. Sergio H. allegedly told her that he would kill her if she returned to Mexico after her experience with voluntary return in 2002 and 2005. Thus, Plaintiffs contend that Laura S. had no experience with voicing her fears of returning, and accordingly, can not be said to have signed the waiver knowingly. One could likewise speculate and reach the opposite result if one assumed that Laura S., like Cardiel, wanted the quickest route to be reunited with her children. The undisputed facts do not support Plaintiffs' speculation. Laura S. would not have needed to know the effect of voicing her fears beforehand—Form I-826 plainly elucidates her right to see an immigration judge should Laura S. have believed that harm awaited her in Mexico.

The Plaintiffs also argue that Laura S. would need to understand that Defendants were incorrect in telling her, as Cardiel testified, that she must be removed to Mexico. [Cardiel Dep. 43:14–16] (Agent Garza and

another agent told Cardiel and Laura S. that they "had to go to Mexico."). The Plaintiffs point out that unlike the parties in *Nose*, where the plaintiff, a highly educated individual who consulted with counsel was found to have voluntarily waived her rights to an immigration hearing, Laura S. would have needed to actually understand that Defendants were incorrect in telling her that she must be removed to Mexico.

The entirety of Laura S.'s options were laid out clearly in Form I-826, a document she could understand and one with which she was familiar. Testimony that Agent Garza and another agent told Laura S. and Cardiel that they "had to go to Mexico" does not rise to the level of misrepresentation that would indicate that the waiver was made unknowingly. Certainly, given the option she chose on Form I-826, she knew she would have to go to Mexico. For example, if Agent Garza had told Laura S. that by signing Form I-826 she could gain citizenship, the Court could conclude that Agent Garza misrepresented the options available to Laura S. on the form. *See Ibarra-Flores*, 439 F.3d at 620 (finding that an alien did not knowingly or voluntarily accept voluntary departure where the immigration officials told the alien that he could apply for residence, but only if he signed a document waiving his right to request any type of immigration relief).

There is no evidence that Agent Garza or any other agent affirmatively misrepresented Laura S.'s rights so as to muddle the rights spelled out on Form I-826. *See Gutierrez v. Mukasey*, 521 F.3d 1114, 1117 (9th Cir. 2008) (finding that an alien knowingly signed

Form I-826 as he alleged no misrepresentations by immigration officials nor any other circumstances suggesting an absence of consent); *Reyes-Rojas v. Lynch*, 644 Fed. Appx. 725, 725–26 (9th Cir. 2016) (where there was no evidence of misrepresentation by immigration officers, substantial evidence supported the Board of Immigration Appeals' decision that the alien knowingly and voluntarily accepted voluntary departure).

Laura S. was of able mind and could read the options plainly listed on Form I-826 (options she was faced with in 2002 and 2005). There is nothing to suggest that Laura S. misunderstood the clear, one-page form provided to her. Cardiel testified that, unlike in her prior experience with voluntary return, she was not told she could see an immigration judge in 2009. [Cardiel Dep. 72:6–15]. The Plaintiffs argue that the alleged difference in disclosure shows that Cardiel was confused about her options when she signed Form I-826 in 2009—the inference being that Laura S. could have similarly been confused. Cardiel, however, provides no relevant testimony to suggest that she could not understand the options presented to her on Form I-826 the morning she was processed with Laura S. Furthermore, to impute Cardiel's state of mind to Laura S. is pure speculation.

"[T]here can be little question" that had Cardiel and Laura S. "read [Form I-826], they would have understood [their] options and understood that they carried lasting legal consequence." *Reyes-Sanchez v. Holder*, 646 F.3d 493, 499 (7th Cir. 2011). Plaintiffs do

not argue that Laura S. did not read the form. There is no evidence that supports this. Moreover, it is clear from Cardiel's testimony that Laura S. understood the consequences of the option she chose even though she was not represented by counsel. Plaintiffs concede as much. *See Silva-Blanco v. Holder*, 568 Fed. Appx. 293, 294 (5th Cir. 2014) (even though an alien subject to removal submitted an affidavit asserting that she did not know what she was doing when she signed Form I-826, the "affidavit [was] not so compelling that no reasonable fact-finder could conclude that she accepted voluntary departure.") (internal quotation marks omitted). Furthermore, all of the evidence supports the conclusion that Laura S. understood the effect of her choice regarding Form I-826, even if she was upset about what would be the eventual result.

The Court finds that the totality of the circumstances indicates that Laura S. understood the options available to her on the one-page Form I-826—a form nearly identical to the one she had seen in both 2002 and 2005. Thus, even when accounting for a presumption against any waiver, the Court finds that the Plaintiffs have not raised a genuine question for the factfinder as to whether Laura S. knowingly signed Form I-826.

3. Did Laura S. Voluntarily Select Removal on Form I-826?

The much closer question is whether a fact issue exists as to whether Laura S. executed Form I-826

voluntarily. Obviously, one can knowingly execute a document and still do so under the influence of coercion. The Fifth Circuit has applied a totality of the circumstances approach in evaluating the voluntariness of a waiver in the non-criminal context.[20] *See Clayton v. ConocoPhillips Co.*, 722 F.3d 279, 292 (5th Cir. 2014) (addressing a waiver in the context of the Employee Retirement Income Security Act).

Potential factors include: (1) the existence of threats or violence, (2) the exertion of improper influence, (3) length of detention, (4) location of detention, and (5) the detainee's maturity, education, and physical and mental condition.[21] *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987); *see Sosa v. Dretke*, 133

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[20] Consent issues most frequently arise in the context of criminal cases involving a search by law enforcement. The Fifth Circuit has outlined the following primary—but not dispositive—factors by which to determine whether consent to a search is knowing and voluntary: (1) the voluntariness of the defendant's custodial status, (2) the presence of coercive police procedures, (3) the extent and level of the defendant's cooperation with police, (4) the defendant's awareness of his or her right to refuse consent, (5) the defendant's education and intelligence, and (6) the defendant's belief that no incriminating evidence will be found. *United States v. Galberth*, 846 F.2d 983, 987 (5th Cir. 1988). Though these factors are obviously relevant in a criminal context, and some of these factors do not apply to Laura S.'s detention, the Court will nevertheless use them as guideposts.

[21] Though the mental condition of a criminal defendant is relevant to voluntariness, "a defendant's mental condition, by itself and apart from its relation to official coercion will not dispose of the inquiry into constitutional voluntariness." *Sosa*, 133 Fed. Appx. at 119 (citing *Colorado v. Connelly*, 479 U.S. 157, 164 (1986)) (internal quotation marks omitted).

Fed. Appx. 114, 119 (5th Cir. 2005) (listing circumstances indicating coercion in the context of a criminal confession). In examining the voluntariness of the waiver, the court must determine if the waiver is the "product of the accused's free and rational choice, and thereby voluntary." *United States v. Anderson*, 755 F.3d 782, 790 (5th Cir. 2014) (discussing coercion in the criminal context) (citing *United States v. Bell*, 367 F.3d 452, 461 (5th Cir. 2004)) (internal quotation marks omitted).

The Plaintiffs have clearly offered evidence of Laura S.'s reason for fearing a return to Mexico and that Agent Garza knew about her fear. Cardiel, Alvarez, and Morales testified that Laura S. told Agent Garza that she feared returning to Mexico because she believed that Sergio H. would kill her. The group testified that Laura S. was crying, begging, distressed, and anguished. Cardiel testified to Laura S.'s ominous statements as they approached the Hidalgo-Reynosa Bridge as they were being removed. Plaintiffs have attached Laura S.'s protective order against Sergio H., and Cardiel, Alvarez, and Morales each averred that Laura S. told Agent Garza about the existence of the protective order.[22] According to Alvarez, before Laura

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[22] The Defendants maintain that Laura S. would not have qualified for immigration status adjustment through the Violence Against Women Act ("VAWA") because both she and Sergio H. were in the country illegally. Under one provision of VAWA, an alien who is a spouse of a United States citizen or lawful permanent resident may self-petition for immigration status adjustment if the alien was subjected to battery or extreme cruelty by his or her spouse. 8 C.F.R. § 204.2; *see* 8 U.S.C. § 1154(c). The

S. was killed, she was trying to raise money to come back to the United States. While Defendants do not openly concede that Laura S. had a true and justifiable fear about returning to Mexico, they certainly do not, at least at this juncture, claim that they are entitled to summary judgment based upon their lack of knowledge of the possibility of harm.

Although the parties engage in many factual disputes, their briefing seems to focus on whether Laura S. voluntarily *signed* Form I-826. That is not necessarily the controlling issue. The critical issue is whether Laura S. was coerced into checking the box associated with voluntary return rather than one of the other two boxes on Form I-826, either of which would have referred Laura S. to an immigration judge. Laura S. would have had to sign Form I-826 had she selected any one of the other options. The Plaintiffs' endeavor

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petitioner may include evidence of the abuse suffered which includes a protective order. 8 C.F.R § 204.2(c)(2)(iv). If the petition is approved by the Department of Homeland Security ("DHS"), the alien's status may be adjusted to that of a lawful permanent resident. *See* 8 U.S.C. § 1255(a). Laura S. did not qualify for discretionary cancellation of removal and status adjustment under U.S.C. § 1229b, also created by VAWA. *See Garcia-Mendez v. Lynch*, 788 F.3d 1058, 1062 (9th Cir. 2015) (discussing the differences between a VAWA self-petition and discretionary cancellation). Under U.S.C. § 1229b, an alien who is deportable from the United States may be eligible for status adjustment to that of a lawful permanent resident if the qualifying alien can show that he or she has been battered or subjected to extreme cruelty by a spouse who is or was a United States citizen or lawful permanent resident. *See* 8 U.S.C. § 1229b(b)(2); *Hernandez-Grado v. Gonzales*, 159 Fed. Appx. 562, 564 (5th Cir. 2005). Sergio H. was not a United States citizen or a lawful permanent resident.

to fracture the shield of qualified immunity rests entirely on Plaintiffs' ability to raise a fact issue showing that Laura S. was forced into checking the only box on Form I-826 that would not have resulted in further processing in the United States.

In summary, Plaintiffs identify the following evidence they claim proves, or at least raises a fact issue, that Laura S. was forced into signing Form I-826 at the CBP processing center: (1) Laura S. refused to sign the form twice, (2) Agent Garza and the other agents present at the processing center were armed, (3) Laura S. was not free to leave the processing area, (4) Laura S. stated that the circumstances of the detention were an "injustice," (5) Agent Garza and another agent were "ordering" Laura S. and Cardiel about, (6) Agent Garza and the other agent told Laura S. and Cardiel that they "had to go to Mexico," (7) Agent Garza used a "high volume voice," (8) Agent Garza looked annoyed, (9) Agent Garza was in a hurry and did not give Laura S. time to read Form I-826, (10) the agents pointed firmly to the signature lines on the I-826 forms and told Cardiel and Laura S. that they had to sign, (11) Cardiel signed because Agent Garza was armed, she could tell that the agents "wanted to throw [her] back," and because Cardiel felt that she had "no choice," and (12) Agent Garza "mock[ed]" and laughed at Laura S. when Laura S. told Agent Garza about her fear of returning her Mexico.[23]

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[23] The Plaintiffs also argue that Laura S.'s signature on Form I-826 was markedly different than her signature on her

The Plaintiffs' argument essentially boils down to this: if Laura S. was so scared of returning to Mexico, why would she sign a document agreeing to her own deportation *unless* she was coerced? Agents Garcia and Garza both testified that they did not remember any specific expression of fear, but had Laura S. expressed a fear of returning to Mexico or had she not voluntarily agreed to her own return to Mexico, she would have been kept in the United States and eventually would have been brought before an immigration judge. From this, the Plaintiffs conclude that Laura S.'s acceptance of being removed had to be the product of coercion. While this argument is not illogical, it is nonetheless argument and not evidence. Furthermore, it is not the only logical deduction that one can draw from the evidence. She just as easily could have checked the box that would get her released the quickest because she was worried about her children, especially the child in need of medical care.

Matricula Consular Identification Card, which, according to Plaintiffs, suggests that she wrote her name under the extreme stress of coercion. [*See* Pls.' Ex. 10, Doc. No. 124–11 at 4; Ex. 11, Doc. No. 124–12 at 3]. A Matricula Consular Identification Card is an ID card issued to Mexican nationals living in the United States. *See* U.S. Gov't Accountability Off., GAO–04–881, *Border Security Identification Cards Accepted within United States, but Consistent Federal Guidance Needed* 5 (2004), http://www.gao.gov/new.items/d04881.pdf (last visited July 7, 2017). This is a wholly conclusory statement to which Plaintiffs provide no supporting evidence. The Plaintiffs' claimed discrepancy is not self-evident, nor is there any expert comparison of the signature on Laura S.'s Form I-826 and the one on her Matricula Consular Identification Card.

The Plaintiffs have certainly created a fact issue as to whether Laura S. told Agent Garza about her fear of returning to Mexico. Nevertheless, to prevail at this stage on the issue of qualified immunity, Plaintiffs need to create a fact issue as to whether Laura S.'s agreement to be removed was the product of coercion.

i. Laura S.'s Physical and Mental Condition

The Plaintiffs have not introduced competent evidence that Laura S.'s maturity, education, and physical condition played a role in their claim of coercion. The uncontroverted testimony is that Laura S. was intelligent. There is no evidence that Laura S. could not read the Spanish translation of Form I-826. Laura S. had been previously removed twice. Cardiel testified that Laura S. understood that signing the I-826 form meant she would return to Mexico, [Cardiel Dep. 46:13–16], a fact that Plaintiffs admit. [Pls.' Resp., Doc. No. 123 at 29].

Further, there is no evidence that Laura S. was mentally impaired at the time she signed Form I-826 or any evidence that the agents overcame Laura S.'s will in a manner that suggests that her critical faculties were in any way disabled. *See Brady v. United States*, 397 U.S. 742, 750 (1970) (finding that there was no evidence that the defendant was "so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages

of pleading guilty" as to render the defendant's plea involuntary).

According to the summary judgment evidence, Laura S.'s fear of returning to Mexico was due in large part to the presence of Sergio H. Though certainly a source of distress and relevant to the totality of the circumstances analysis, this was a threat that predated her interaction with Agent Garza and the other agents at the processing center. The danger Sergio H. posed was not introduced or created by Agent Garza or any other agent. Moreover, some level of general distress is linked to the deportation of any individual, who, like Laura S., was once again faced with removal after prior unsuccessful attempts to enter and remain in the United States illegally. The Plaintiffs provide no evidence to suggest that Agent Garza or any other agent exacerbated Laura S.'s fear of Sergio H. to somehow influence Laura S.'s decision to choose the voluntary return option.

ii. The Circumstances of the Detention

The Plaintiffs have not provided competent summary judgment evidence indicating the existence of coercion resulting from the length, location, or manner of her detention. Cardiel testified that neither she nor Laura S. was restrained. Even had Cardiel and Laura S. been handcuffed, which they were not, such a factor would not necessarily tip the legal balance towards coercion. *See United States v. Cardenas*, 410 F.3d 287, 295 (5th Cir. 2005) ("Such basic police procedures as

restraining a suspect with handcuffs have never been held to constitute sufficient coercion to warrant suppression."); *United States v. Jones*, 475 F.2d 723, 730 (5th Cir. 1973) (defendant's statement consenting to search made while he was under arrest, in handcuffs, in a dazed state, and in the presence of at least five to seven federal agents was not the product of coercion).

The entire process was devoid of physical hardship and Cardiel averred that it only took between 20 or 30 minutes. The location of the detention, at the CBP processing center in Weslaco, was the standard location to process aliens who were unlawfully present in the United States, and there is no evidence that those facilities played any role in coercing Laura S., Cardiel, or Morales to opt for a return to their native country. The Plaintiffs suggest that the Court should look to the restriction on Laura S.'s ability to leave the detention center. Laura S. was in the country illegally and subject to being detained. Moreover, some form of restraint is present in every detention. That factor, in and of itself, does not rise to coercion. There is no evidence that the circumstances of the detention in this case were in any way coercive.

The fact that the officers had uniforms and carried firearms does not equate to coercion. Under Fifth Circuit precedent, where officers were not pointing their firearms at the defendant and were not threatening the defendant or shouting, the "mere presence of armed officers [did] not render a situation coercive." *United States v. Martinez*, 410 Fed. Appx. 759, 764 (5th Cir. 2011). Further, the case law suggests that the fact

that Agent Garza and the other agents were armed or using a "high volume voice" should not be assigned significant weight towards a finding of coercion. *See United States v. Jones*, 359 F.3d 921, 923–24 (7th Cir. 2004) (finding a postal employee's confession voluntary where a postal inspector questioned the employee with a raised voice for approximately one hour while a second inspector was visibly armed).

From a practical standpoint, if one can raise the specter of coercion from mere interaction with an authoritative and armed officer, even the most mundane of encounters with law enforcement could implicate a due process violation. Simply because Agent Garza was armed or looked annoyed (Cardiel testified that Agent Garza "looked like" he wanted to throw Cardiel and Laura S. back) does not mean that he coerced Laura S. This is especially true where the uncontroverted evidence is that no agent ever unholstered his or her weapon or in any fashion overtly threatened Laura S. *See Anderson*, 755 F.3d at 791 (ruling that a confession was not involuntary where the defendant "was not handcuffed during the interview, the officers never displayed any weapons, and they never placed their hands on him.").

The Plaintiffs also claim that Laura S. was not given enough time to read Form I-826. Cardiel testified that she overheard Agent Garza say that he was in a rush and that he had to leave. [Cardiel Dep. 43:7–10]. Based upon this statement, Plaintiffs argue that Laura S. was pressured into signing the form without adequate time to consider her options. Yet, according to

Cardiel's testimony, the duration of time involved between the time the agents presented the one-page Form I-826 to each women and the time when Cardiel and Laura S. signed the form was between 20 and 30 minutes. [Cardiel Dep. 47:10–13].

The Supreme Court has recognized that involuntariness can stem from "psychological pressure," *Withrow v. Williams*, 507 U.S. 680, 708 (1993), a category that this Court understands may include time pressure, conceptually similar to the argument Plaintiffs allege here.[24] The degree of time pressure needed to raise the specter of involuntariness is obviously relevant to the totality of the circumstances analysis. For example, there is considerable time pressure imposed on a defendant in the context of a plea agreement—yet plea agreements made under such pressure are routinely held up against due process objections in the criminal context (where criminal defendants are afforded greater protections of their rights). *See United States v. Marrero-Rivera*, 124 F.3d 342, 350 (1st Cir. 1997) ("the strategic decision to plead guilty [is] not [necessarily] rendered involuntary by the anxieties and time pressures confronting [the defendant].").

The Defendants, relying on two cases out of the Seventh Circuit, respond that Plaintiffs' claim that

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[24] In cases dealing with involuntary retirement allegations made by federal employees, courts have ruled that time pressure, in and of itself, does not make a decision to retire involuntary unless it also interfered with the employee's ability to make an informed choice. *See, e.g., Paul v. Dep't of Navy*, 217 F.3d 860 (Fed. Cir. 1999).

Laura S. was rushed into signing is legally insufficient evidence of coercion. In *United States v. Baptist*, the plaintiff, an alien subject to removal due to a prior felony drug trafficking and controlled substance offense conviction, waived his right to appear before an immigration judge and instead signed a stipulation agreeing to removal. 759 F.3d 690, 693 (7th Cir. 2014). As evidence for why his waiver was involuntary, the plaintiff claimed that he was told by an immigration officer to "hurry up and sign [the form] if he wanted to go back to Belize." *Id.* at 696. The *Baptist* court indicated that the statement was not competent evidence of coercion as the plaintiff never "assert[ed] that anyone tricked or pressured him into signing the form." *Id.*

Henn, the second case cited by Defendants, addressed 12 employees' acceptance of early retirement in the context of an age discrimination case. *Henn v. Nat'l Geographic Soc.*, 819 F.2d 824, 826 (7th Cir. 1987). The court was tasked with reviewing whether the employees voluntarily agreed to early retirement or whether the retirement was actually a discharge, and thus, a potential violation of the Age Discrimination in Employment Act. *See id.* The *Henn* court ruled that time pressure was not a factor for the employees as every one of them had time to consult both their spouses and financial advisors about the early retirement option. *See id.* at 829. Though *Henn* articulates a worthwhile principle, it does not as a matter of law dispose of Plaintiffs' claim that the time pressure exerted on Laura S. could be a legally relevant factor in the involuntariness calculus, especially given the fact that

Laura S. was processed during the wee hours of the morning and no advisors were at hand.

The Court does not find either of the cases Defendants cite to be compelling, particularly the *Henn* case since its relevant facts are so dissimilar to the case at hand. It is clear to the Court that time pressure can be competent evidence of coercion especially when it is intertwined with other classic signs of coercion. *See Paroczay v. Hodges*, 297 F.2d 439, 440 (D.C. Cir. 1961) (threat of a lawsuit); *Angarita v. St. Louis County*, 981 F.2d 1537, 1545 (8th Cir. 1992) (threat of severe public embarrassment); *Middleton v. Dep't of Def.*, 185 F.3d 1374, 1380–81 (Fed. Cir. 1999) (potential imposition of intense health-related burdens), *Tatum v. Axxis Drilling, Inc.*, CIV.A. 08-1237, 2009 WL 4277241, at *1, 9 (W.D. La. Nov. 30, 2009) (flagrant misrepresentations about the plaintiff's rights).

A subjective suggestion of time pressure without some objective indicia of coercion is not competent evidence of involuntariness. *See, e.g., Evans v. Asian Am. Recovery Services*, C-08-0944 EMC, 2008 WL 5273748, at *4 (N.D. Cal. Dec. 19, 2008) (rejecting plaintiff's claim that her rushed settlement agreement was the product of coercion where there was no objective indications of coercive pressure on plaintiff). Form I-826 is a one-page document. [*See* Defs.' Ex. 2, Doc. No. 119–2 at 4]. Moreover, Laura S. had seen the same or similar form on prior run-ins with CBP. The Plaintiffs have certainly not provided any evidence of the more recognized forms of coercion, or that Laura S. was ever emotionally abused (separate and apart from the anxiety

she might have experienced at the prospect of deportation) or physically threatened. Consequently, the weight of the time pressure factor towards a finding of involuntariness—though nonetheless relevant—must be somewhat reduced. This is especially true in this situation where all Laura S. had to do was check a different box and she would have been kept in custody until she was brought before an immigration judge.

"The absence of intimidation, threats, abuse (physical or psychological), or other coercion is a circumstance weighing in favor of upholding what appears to be a voluntary consent." *Jones*, 475 F.2d at 730. Without objective indicia of coercion, almost every factor this Court is tasked to weigh stems from Cardiel's testimony. Cardiel, herself, could not settle on a reason for why [sic] chose the option she did on Form I-826. Cardiel gave four different reasons for why she ultimately selected voluntary return: (1) that the agents were armed, (2) that she did not want to be detained for a long period of time, (3) that the agents looked like they wanted to get her back to Mexico, and (4) that she felt that she had no other choice. Cardiel's testimony about her own subjective mindset is of little relevance as to why Laura S. decided to sign given the lack of objective evidence that either Cardiel or Laura S. was physically or emotionally threatened.[25]

Moreover, to the extent it is relevant, Cardiel, herself, testified that she did not think Agent Garza would

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[25] Obviously for summary judgment purposes, the Court accepts all this testimony, some of which is contradictory, as true.

hurt her, but to the contrary, was worried that Agent Garza would detain her for a long period of time. [Cardiel Dep. 71:1–8]; *see Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988) (explaining that the mere fact that the choice is between comparably unpleasant alternatives does not establish that a choice is involuntary). Ironically, Plaintiffs' position in the instant case is just the opposite as Cardiel's. Their contention is that Laura S. should have been detained for a longer period of time and eventually brought before an immigration judge.[26]

The evidence that the agents "mock[ed]" Laura S. (to which Plaintiffs provide no legal authority as to its role in voluntariness), that Laura S. initially refused to sign Form I-826, the circumstances of the detention, the so-called time pressure, that the agents ordered that Laura S. and Cardiel sign Form I-826, and that the agents told the pair that they "had to go to Mexico" is unaccompanied by even a single instance of "actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Brady*, 397 U.S. at 750.

At the risk of repetition, there is not a shred of evidence that suggests that Laura S. was threatened, physically forced, mentally overpowered, or in some way or another, deprived of her choice to check the box next to either of the two options on Form I-826 that

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[26] The decedent's position that night was that she wanted to be outright released—a result to which she was not entitled. The Plaintiffs have not argued that position in their responses.

would have referred her case to the immigration judge—options that were also available to her on nearly identical forms that she received when she was repatriated to Mexico in 2002 and 2005. There is no evidence that her signature on Form I-826 was falsified or manipulated. *See generally Lanuza v. Love*, C14-1641 MJP, 2015 WL 1282132, at *2 (W.D. Wash. Mar. 20, 2015) (ruling that an immigration officer was not shielded by qualified immunity in a *Bivens* suit as he submitted a falsified Form I-826). At no point was either Laura S. or Cardiel forced to put ink to paper. *See Reyes-Rojas*, 644 Fed. Appx. at 725 (substantial evidence supported the determination that an alien knowingly and voluntarily accepted voluntary departure where there was no evidence of overt misrepresentation or intimidation by immigration officers).

The I-826 form listed Laura S.'s options in Spanish. Among the options presented, Laura S. could have requested a hearing before the immigration court to see if she could remain in the United States. Alternatively, Laura S. could have indicated that she believed she would face harm if she returned to Mexico, and accordingly, had her case referred to an immigration judge. Laura S. did not select either of those options—both of which would have allowed her to stay in the United States for further processing. Instead, Laura S. checked the voluntary return option which she knew from prior experience and from the statements of the agents would get her released and deported. Both Laura S. and Cardiel had been previously removed. *See Anderson*, 755 F.3d at 791 ("Anderson had significant

contact with law enforcement prior to the instant arrest. His experience with the criminal process makes it less likely that his confession was involuntary.").

It could have been the case that Laura S., like Cardiel, did not want to be detained for a lengthy period of time and planned on returning to the United States within days of her repatriation (which is exactly what Cardiel said at one point was her motivation and which she actually did). The circumstances certainly suggest that motivation as much as it does submission to coercion. Cardiel was not afraid of physical harm at the hands of the agents, but instead thought that the agents would "lock [her] in for a long period of time." [Cardiel Dep. 71:1–28]. Cardiel testified that she felt threatened because she "didn't want to be locked in because [she had] children." [*Id.* at 72:5, 73:1–2]. By her own admission, Cardiel signed the document because it was the fastest way to be released from custody. [*Id.* at 73:3–5].

Like Cardiel, Laura S. had children. In fact, Agent Garza allowed Laura S. to make a phone call to the children's grandmother to make "suitable arrangements for [their] care and well being. . . ." [Defs.' Ex. 2, Doc. No. 119–2]. Laura S. could have wanted the faster way to freedom so she could reunite with her children (one of whom needed a medical operation) as quickly as possible. Apparently, Cardiel performed a "cost-benefit" analysis of her available options: she could return to Mexico within hours of her detention, and at her prerogative, swim back over to the United States to be with her children—or she could go through a

detention process which by necessity would require her to remain in custody. What is to say that Laura S. did not evaluate her alternatives similarly?

The problem with this entire analysis into Laura S.'s motivation is that it is built on a mountain of speculation. Cardiel does not know why Laura. S. signed. [Cardiel Dep. 46:24–25, 47:1–3]. Laura S.'s decision to check the voluntary return box could have been based on any of the reasons mentioned above or a reason that neither side has suggested. The obstacle hamstringing Plaintiffs' claim that Laura S. was forced to select voluntary return is that Plaintiffs' primary witness has not identified even a single instance where Agent Garza or any other agent physically or emotionally coerced Laura S. or directed her to check the box she did on the I-826 form. The Court has discussed the latter point to exhaustion because it is the key issue controlling the question of governmental immunity.

iii. Absent Direct Evidence, Does the Totality of the Circumstantial Evidence Raise a Material Issue of Fact Supporting Coercion?

Since no one provides evidence of direct coercion, and since none of the factors discussed above individually demonstrate coercion, the Court is left with having to decide whether the following pieces of circumstantial evidence, which considered together, raise a fact issue as to whether Laura S. was forced to agree to voluntary return:

(1) Agent Garza "mock[ed]" and laughed at Laura S.;

(2) The agents pointed firmly at Form I-826 in a strong manner;

(3) The agents ordered Cardiel and Laura S. to sign Form I-826 in a high-volume voice;

(4) That Laura S. was under mental strain due to her fear of returning to Mexico;

(5) Laura S. verbally refused to sign the form twice and stated "this is an injustice";

(6) At some point in time, the agents told Laura S. and Cardiel that they "had to go to Mexico"; and

(7) That Cardiel signed because she felt she had "no choice" (but of course she also signed because she did not want to be detained for a lengthy period of time).

The most difficult question in this case (at least so far) is whether these threads of circumstantial evidence, which must be accepted as true in considering a summary judgment motion, when woven together create an issue of material fact as to whether Agent Garza "coerced" Laura S. into filling out the I-826 form in the manner she did.[27] The most supportive factors

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[27] Since the case law dictates that the question of qualified immunity must be resolved first, this Court has not yet had to address the many thorny legal issues waiting in the wings, including the difficult question of proximate cause. The issue of proximate cause, which was alluded to in the current motions, will contain multiple questions including whether the act of a

presented by the Plaintiffs include: (1) the use of an authoritative voice, (2) the pointing at the Form I-826 combined with the instruction to sign the form, and (3) the statement that they (Laura S. and Cardiel) needed to go to Mexico.

The other factors, such as Laura S. claiming the situation was an "injustice" and her numerous requests to be released, while giving context, are not evidence of coercion. They are certainly proof that Laura S. did not want to be detained or deported. While she had valid and compelling reasons for not wanting to be detained or deported, she had no legal right to simply be released. The fact that Agent Garza (or any of the other agents for that matter) did not release her is not evidence of coercion. The mental strain evidenced by the various statements attributed to Laura S. is certainly understandable as she was faced with having to choose between two alternatives (immediate return to Mexico or prolonged detainment awaiting further immigration proceedings), neither of which were desirable from her standpoint.

Again, these alternatives were not created that night by the agents. They were created by the applicable law, by the agents' duty to enforce that law, by the prior choice of Laura S. to reside in the United States

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CBP agent in expelling an illegal alien can proximately cause an event which was effectuated by a third person committing a crime in a different country many days after the alien was removed from the United States. This issue will provide the Court with a more complicated scenario than that considered in the classic *Palsgraf* case. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928).

illegally (as opposed to legally immigrating to the United States or to some other country or moving to some other part of Mexico far away from Sergio H.), by Sergio H. (whose uncontrollable rage eventually led to death of Laura S.), and by her belief (a belief that turned out to be accurate) that the local Reynosa law enforcement authorities could not adequately provide protection for one of its own citizens. As stated before, all these factors provide context, but they are not necessarily evidence of wrongdoing by the agents.

Despite the lamentable circumstances that seemingly surround every aspect of this case, the crux of the matter seems to narrow to the question of why Laura S. chose the voluntary return option on the Form I-826 instead of opting for one of the other two options which would have resulted in her remaining in CBP custody. Perhaps Laura S. did not want to remain in custody and thought this option was her fastest route to freedom and ultimately reuniting with her children. Perhaps she chose that route because Cardiel did. Perhaps she mistakenly marked the wrong option. Perhaps she chose that option for a totally different reason that none of the parties have suggested.

The pivotal point for this Court is that even when the Court considers the totality of the evidentiary picture, it can not conclude that there is evidence that Agent Garza acted in an objectively unreasonable manner. Stated differently, the Court can not conclude that there is evidence that Agent Garza coerced Laura S. into choosing the voluntary return option. This Court is not unsympathetic with the quandary that

Plaintiffs and their counsel face in combatting the government's Motion. The only person who can truly reveal Laura S.'s motivation was killed. As such, the best evidence Plaintiffs can cobble together is that derived from those who were with her the night in question and for the following week. The Court has described at length the results of those efforts above. Nevertheless, it holds that even when one considers the totality of the circumstantial evidence, the evidence does not create an issue of material fact that would defeat Agent Garza's defense of qualified immunity.

V. Conclusion

To advance this lawsuit, the Plaintiffs needed to raise an issue of triable fact that: (1) Agent Garcia was personally involved in the violation of Laura S.'s constitutional rights and that his conduct was objectively unreasonable, and/or (2) that Agent Garza's conduct was objectively unreasonable such that he would not be protected by the defense of qualified immunity. Plaintiffs have not, as required to sustain a *Bivens* claim against Agent Garcia, created a fact issue as to whether Agent Garcia was acting in any capacity other than a supervisorial one at the CBP processing center on the night in question or that he ever acted in an untoward manner. The Court grants his summary judgment motion. Despite their best efforts, Plaintiffs have failed to clear the evidentiary hurdle created by the death of Laura S. and consequently have failed to create a fact issue as to whether Agent Garza coerced Laura S. into selecting the voluntary return option on

Form I-826. That being the case, the Plaintiffs have not created an issue of material fact as to whether Agent Garza acted in an objectively unreasonable manner so as to deprive him of the defense of qualified immunity at this juncture in the proceeding. The Court therefore holds that Agent Garza is immune from Plaintiffs' suit. Per *Celotex*, the Court hereby grants Defendants' Motion for Summary Judgment [Doc. No. 118]. Pursuant to Fed. R. Civ. P. 58(a), the Court will issue a final judgment in this case in a separate document.

Signed this 21st day of July, 2017

/s/ Andrew Hanen
Andrew S. Hanen
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

Maria S., as Next Friend for Minors E.H.F., S.H.F., and A.S.G., *Plaintiffs*,	§	
v.	§	Civil Action No. 1:13-cv-108
Ramiro Garza, Ruben Garcia, et al., *Defendants*.	§	

Memorandum Opinion and Order

(Filed Apr. 22, 2016)

Before this Court are Plaintiffs' Motion to Compel Discovery [Doc. No. 96], Defendants' Motion to Quash Plaintiffs' Motion to Compel Discovery [Doc. No. 101], Plaintiffs' Response to Defendants' Motion to Quash Discovery [Doc. No. 104], Defendants' Reply to Plaintiffs' Response [Doc. No. 105], Plaintiffs' Advisory [Doc. No. 111], and Defendants' Response to Plaintiffs' Advisory [Doc. No. 112]. For the following reasons, Plaintiffs' Motion to Compel Discovery is granted in part and denied in part; Defendants' Motion to Quash is also granted in part and denied in part.

I. The Scope of Discovery

As this Court has discussed extensively in a prior opinion in this case [Doc. No. 81], the Fifth Circuit has

detailed a two-step process to determine whether Defendants have qualified immunity. First, the Court must determine—and already has in this case—that the pleadings assert facts that would overcome qualified immunity if true. Second, the subject of this order, if the Court needs more factual development to determine whether the allegations are supported by evidence sufficient to raise a question of fact, it must permit discovery limited to this narrow issue. For determining qualified immunity in this case, there must be enough evidence to raise a fact issue as to whether Defendants coerced Laura S. into signing the voluntary return form at the moment in question. This determination is limited to the actions of these officers at the time they met with Laura S.—their actual acts concerning her and her response—and does not include evidence that has no bearing on this determination.

II. The Discovery Requests in Plaintiffs' Motions

With this limited scope of discovery in mind, the Court compels the production of:

1. Any handbooks and similar manuals detailing procedure provided to the Defendants prior to June 1, 2009 regarding voluntary return and interviewing techniques, including the 2004 Border Patrol Handbook;

2. Customs and Border Protection (CBP) policies and procedures concerning voluntary return for the stations at which

Defendants have been stationed in the Rio Grande Valley;

3. Any past claims of coercion against the two Defendant officers from January 2006 through June 2009;

4. The work shifts and overtime that Defendants worked between May 15, 2009 and June 15, 2009;

5. The names of any credible fear officers on duty during the time that Laura S. was processed;

6. The Weslaco station's chain of command at the time of the incident; and

7. Any non-privileged CBP investigations into this current case.

The Court acknowledges that Defendants claim to have provided some of the information already and does not require Defendants to reproduce that which has already been produced.

Plaintiffs are allowed to ask questions in depositions related to these items, as long as they are for the sole purpose of determining whether the Defendants coerced Laura S. into accepting a voluntary return.

If Plaintiffs meet their burden of showing that there is a fact issue as to whether Defendants lack qualified immunity, additional discovery may be permissible in the future. Therefore, the Court limits all discovery to the narrow issue of whether Defendants actually violated Laura S.'s rights by coercing her into

signing the voluntary return form and allegedly forcing her to go back to Mexico, thereby forcibly depriving her of any legal process to which she was entitled. All other requests to compel are denied.

III. Conclusion

For the aforementioned reasons, Plaintiffs' Motion to Compel [Doc. No. 96] is granted in part and denied in part. Defendants' Motion to Quash [Doc. No. 104] is granted in part and denied in part.

Signed this 22nd day of April, 2016.

/s/ Andrew S. Hanen
Andrew S. Hanen
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

Maria S., as Next Friend for E.H.F., S.H.F., and A.S.G., Minors, *Plaintiff*,	§	
vs.	§	Civil Action No. 1:13-CV-108
Ramiro Garza, et al., *Defendants*.	§	

MEMORANDUM OPINION AND ORDER

(Filed Jul. 15, 2015)

The Plaintiff in this suit is the next friend of the three surviving minor sons of Laura S., a citizen of Mexico, who is now deceased. Plaintiff claims that Laura S. was removed from the United States without due process of law and alleges that this deprivation of rights caused Laura S.'s death. Plaintiff filed a *Bivens* action and seeks to recover from the immigration officers that effectuated Laura S.'s removal. [Doc. No. 63]. In response, the immigration officers filed a Motion to Dismiss [Doc. No. 67], asserting several grounds they claim warrant the dismissal of Plaintiff's suit. For the reasons described below, Defendants' Motion to Dismiss is **DENIED**.

I. Background

Plaintiffs allege the following facts in their complaint.[1] Laura S., the mother of three sons, was a citizen of Mexico. [Doc. No. 63 at 3-4]. She never had legal status in the United States. *Id.* The father of two of Laura S.'s sons—Sergio H.—physically abused Laura S. *Id.* at 4. In April 2008, Laura S. obtained a protective order against Sergio H. from a municipal court in McAllen, Texas. *Id.* Sergio H. returned to Mexico and was allegedly working with a drug cartel. *Id.* Sergio H. threatened Laura S. and told her that he would kill her if he ever saw her again. *Id.*

On June 8, 2009, Laura S. was traveling in a vehicle with three other passengers near Pharr, Texas when they were stopped by a law enforcement officer for a driving infraction. *Id.* The officer asked the vehicle's passengers for proof of citizenship or immigration status. *Id.* Laura S. and two other passengers were unable to produce the necessary papers, and the law enforcement officer turned them over to Defendant Ramiro Garza, a United States Customs and Border Patrol ("CBP") agent. *Id.* at 5.

Defendant Garza transported Laura S. and the other two passengers to a CBP center near Pharr, Texas. *Id.* While in the vehicle, Laura S. explained to Defendant Garza that her dangerous ex-boyfriend

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[1] When evaluating a Motion to Dismiss, the Court must accept the facts in Plaintiffs' complaint as accurate. Consequently, the Court's recitation of those facts herein should not be taken as a finding by this Court as to the accuracy of those allegations.

resided in Mexico, and that she feared for her life if she returned there. *Id.* Laura S. wept and begged not to be returned to Mexico. *Id.*

When the group arrived at the CBP center, they were taken into an office for fingerprinting and to complete paperwork. *Id.* The group was joined by Defendant Ruben Garcia and two other unknown Defendants, all CBP agents. *Id.* at 6. Laura S. was weeping and anguished when she spoke with Defendants, and informed them that she feared for her life if she returned to Mexico. *Id.* Although Laura S. informed Defendants of Sergio H.'s threats, Defendants did not question Laura S. about her expressed fears nor attempt to verify or evaluate her risk of harm. *Id.* Defendants did not inform Laura S. of any of her legal rights, such as the right to seek asylum or the right to a hearing before an immigration judge. *Id.*

Rather, Defendants "rushed through the proceedings" and "made it clear to [Laura S.] that she was returning to Mexico immediately, despite her pleas." *Id.* at 7. Defendants presented Laura S. with a number of papers, and told her to sign "here, and here and here." *Id.* Laura S. was not given a chance to read the papers, nor was she told what she was signing. *Id.* Laura S. refused to sign the papers, but Defendants "forcefully demanded that she sign." *Id.* One of the forms Laura S. was forced to sign was a voluntary departure form, a procedure by which an alien may consent to summary removal from the United States. *Id.* at 11. By signing a voluntary departure form, Laura S. waived

her right to a deportation hearing and any other forms of relief for which she may have been eligible. *Id.*

After Laura S. and the other two passengers signed the papers, including the voluntary departure forms, Defendant Garza drove them to the international bridge. *Id.* at 8. Laura S. wept on the way to the bridge, telling Defendant Garza that she would not survive the week in Mexico. *Id.* In the early morning hours of June 9, 2009, Defendant Garza "forced" the group to cross the international bridge and return to Mexico. *Id.*

Once she returned to Mexico, Laura S. stayed at her grandmother's house. *Id.* Laura S.'s friends and relatives began "emergency efforts" to get her out of Mexico. *Id.* After learning of Laura S.'s return to Mexico, Sergio H. soon accosted her, "blocking her car and beating her brutally." *Id.* Laura S. was rescued by a relative. *Id.* Several days later, on June 14, 2009, Sergio H. abducted Laura S. and killed her. *Id.*

The present suit was filed on behalf of Laura S.'s three minors sons ("Plaintiffs"). *Id.* at 2-3. Plaintiffs bring a *Bivens* claim against the four CBP agents (collectively, "Defendants") that effectuated Laura S.'s removal from the United States, and seek to recover money damages for the death of their mother. *Id.* at 12-14. Plaintiffs allege that Defendants violated Laura S.'s Fifth Amendment right to procedural due process when they forced her to sign the voluntary departure form that effectuated her return to Mexico. *Id.* at 13. Plaintiffs contend that Laura S. was eligible for

various forms of relief under United States immigration law, such as mandatory withholding of removal under the Convention Against Torture or mandatory withholding based on persecution risks. *Id.* at 9. Nevertheless, by allegedly forcing Laura S. to sign a voluntary departure form,[2] Plaintiffs claim that Defendants denied Laura S. access to whatever relief she may have been entitled to and forced her to return to a country where she knew her death was imminent. *Id.* at 10.

In response to Plaintiffs' Complaint, Defendants filed a Motion to Dismiss. [Doc. No. 67]. In their Motion to Dismiss, Defendants assert five separate grounds that they argue warrant the dismissal of Plaintiffs' suit: (1) 8 U.S.C. § 1252(g)'s jurisdictional bar; (2) the absence of a constitutionally-protected right; (3) inapplicability of the *Bivens* doctrine; and (4) qualified immunity. *Id.* For the reasons discussed below, Defendants' Motion to Dismiss is **DENIED**.

II. 8 U.S.C. § 1252(g) Jurisdictional Bar

In their Motion to Dismiss, Defendants argue that § 1252(g) of the Immigration and Nationality Act bars the Court from considering Plaintiffs' suit. Section 1252(g), entitled "Exclusive Jurisdiction," states:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241

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[2] As with the factual allegations made in the Complaint, this Court's recitation of Plaintiffs' legal allegations should not be taken as conclusions of law made by this Court.

> of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g). Interpreting § 1252(g) narrowly, the Supreme Court has held that it does not bar judicial review of all claims arising from deportation proceedings. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Rather, § 1252(g) "applies to only three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* (quoting 8 U.S.C. § 1252(g)) (emphasis in original). Illustrating its holding, the Supreme Court offered examples of the many decisions made during the deportation process that would not be barred from judicial review by § 1252(g), including "the decisions to open an investigation, to surveil the suspected violator, [and] to reschedule the deportation hearing . . ." *Id.*

The three discrete actions described as falling under § 1252(g)'s jurisdictional bar represent distinct components of the deportation process. The first action, "commencing proceedings," occurs after CBP agents apprehend an alien with no legal status in the United States and "file the appropriate charging document with the immigration court." *DeLeon-Holguin v. Ashcroft*, 253 F.3d 811, 815 (5th Cir. 2001). The charging

document is served on the apprehended alien, and gives him or her notice of the nature of the proceedings and time to prepare a defense. U.S. Dep't of Justice, Immigration Court Practice Manual at 55. "Adjudicating cases" refers to the actions taken to maintain removal proceedings against an alien, which culminate in a hearing held before an immigration judge charged with "deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a. If the immigration judge finds that an alien has no legal status to remain in the United States, an order of removal is issued. *Id.* The final action referenced in § 1252(g), "executing removal orders," occurs when an illegal alien is removed from the United States pursuant to a court order. *See Sifuentes-Barraza v. Chertoff*, No. 03-51202, 2006 WL 2522143 (5th Cir. Sept. 1, 2006).

Though § 1252(g) has limited judicial review in these three areas, it has not prevented courts from ruling on constitutional claims arising in the deportation context. *Humphries v. Various Fed. U.S.I.N.S. Employees*, 164 F.3d 936, 944-45 (5th Cir. 1999). For example, in *Humphries v. Various Federal U.S.I.N.S. Employees*, the plaintiff brought suit alleging that he had been mistreated while he was in custody pending the execution of his removal order. *Id.* at 939. When determining whether § 1252(g) barred the plaintiff's suit, the Fifth Circuit noted that the plaintiff "would not have been subjected to the alleged mistreatment had the decision not been made to place [him] in detention while awaiting exclusion." *Id.* at 945. Nevertheless, this tenuous connection to "the decision . . . [to] execute [a] removal

order" was not sufficient to bring the plaintiff's suit within the purview of § 1252(g). *See id.* Rather, the plaintiff's constitutional claim challenging the treatment he received while in detention bore "no more than a remote relationship" to the initial decision to execute his removal order, and was not barred by § 1252(g). *Id.*; *see also Flores-Ledezma v. Gonzales*, 415 F.3d 375, 381 (5th Cir. 2005) (§ 1252(g) did not bar plaintiff's constitutional challenge to statutory scheme that permitted INS to exercise discretion regarding whether to commence removal proceedings); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) (§ 1252(g) did not preclude the court "from ruling on constitutional challenges to deportation procedures"); *Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017, 1021-22 (6th Cir. 1999) (plaintiffs' due process challenges to deportation procedures not barred by § 1252(g)); *Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999) (plaintiff's procedural due process claim arising in deportation process not barred by § 1252(g)).

Here, the facts of the case do not require the Court to review any of the "three discrete actions" encompassed by § 1252(g). Plaintiffs' allegations do not fall within the purview of § 1252(g)—they do not contend that the CBP agents commenced removal proceedings against Laura S., or that they sought to obtain or execute a final order of removal. Rather, Laura S.'s removal from the United States was effectuated pursuant to the CBP agents' use of voluntary departure. Voluntary departure permits "aliens to depart voluntarily from the United States . . . *in lieu of* being subject

to [removal] proceedings. . . ." 8 C.F.R. § 240.25(a) (emphasis added). CBP agents have discretion when deciding to offer an apprehended illegal alien voluntary departure instead of initiating removal proceedings. *See* 8 U.S.C. § 1252(a)(2)(B). Since Laura S. was summarily removed from the United States through voluntary departure, Defendants never commenced removal proceedings against her nor pursued them to a final order of removal. Therefore, the facts of Plaintiffs' case do not require the Court to impermissibly review any of the "three discrete actions" protected by § 1252(g)'s jurisdictional bar.

While the Court concedes that one could argue that the Plaintiffs are ultimately complaining about the Defendants' discretionary decision to *not* commence removal proceedings against Laura S., or of their decision to offer her voluntary departure, Plaintiffs' real challenge is to the constitutionality of the procedures Defendants used to secure Laura S.'s consent to a voluntary departure. Like the situation in *Humphries*, it is true that Laura S. would not have been subjected to the alleged procedural due process violation if it had not been for the Defendants' decision against commencing removal proceedings. As in *Humphries*, however, the alleged procedural due process violation in this case bears "no more than a remote relationship" to the Defendants' decision to offer Laura S. voluntary departure. Plaintiffs' constitutional allegations present an inquiry wholly separate from the Defendants' initial decision to not commence removal proceedings against Laura S. The Court is not asked to

review whether Defendants' discretionary decision was appropriate, but whether the procedures used to gain Laura S.'s consent complied with constitutional standards. Though factually related, the procedures used to gain Laura S.'s consent are merely ancillary to the Defendants' discrete decision to offer her a voluntary departure, and are not encompassed within § 1252(g)'s jurisdictional bar. Defendants' Motion to Dismiss on this point is denied.

III. Presence of a Constitutionally-Protected Right

Second, Defendants contend that Plaintiffs cannot establish a violation of Laura S.'s constitutional rights as necessary to proceed with their *Bivens* claim. Defendants argue that, because Laura S. did not have the legal status necessary to remain in the United States, she did not possess the constitutional right to a hearing or to choose how her removal from the United States would be effectuated.

This Court agrees that Laura S., as an alien illegally in the country, had no constitutional right to remain in the United States. Nevertheless, "even aliens who have entered the United States unlawfully are assured the protections of the fifth amendment due process clause." *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1036 (5th Cir. Unit B 1982). The "fundamentals of due process" require that an individual be given "notice, hearing, and an appeal" prior to being deported. *Zhang v. Gonzalez*, 432 F.3d 339, 346 (5th Cir. 2005). An individual may waive these due process protections,

though, such as by signing a voluntary departure form. By signing a voluntary departure form before removal proceedings have commenced, an individual concedes his removability and agrees to waive his rights to a hearing before an immigration judge. *Nose v. Attorney Gen. of the United States*, 993 F.2d 75, 78-79 (5th Cir. 1993). Any such waiver, however, "must be made knowingly and voluntarily." *Id.* at 79 (emphasis added).

Reviewing facts analogous to those in the present case, the Ninth Circuit held that an individual was denied procedural due process when he did not knowingly and freely sign a voluntary departure form. *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1163 (9th Cir. 2005). In *Salgado-Diaz v. Gonzales*, the plaintiff was removed from the United States pursuant to his signature on a voluntary departure form. *Id.* at 1160. The plaintiff asserted, however, that he "did not agree to leave the country voluntarily" and signed the departure form because the CBP agents represented to him that his signature on the document was necessary to look up his pending immigration proceedings. *Id.* at 1160, 1163. The Ninth Circuit held that this misrepresentation regarding the effect of plaintiff's signature constituted a deprivation of the plaintiff's procedural due process rights, and essentially "denied [the plaintiff] his day in court." *Id.* at 1163. In a similar situation, the Third Circuit in *Romero-Fereyos v. Attorney General* found that federal agents violated an alien's procedural due process rights when they confiscated his glasses and subsequently had him sign a removal form, even though the plaintiff was eligible for relief

from deportation. *Romero-Fereyos v. Attorney Gen. of United States*, 221 F. App'x 160, 164 (3d Cir. 2007). As both of these cases show, any waiver of rights made pursuant to a signature on a voluntary departure form must be effectuated willingly and with full knowledge of the effects of one's actions.

Courts have also issued injunctions to address procedural due process violations stemming from CBP agents' use of voluntary departure forms to effectuate the removal of illegal aliens. For example, in *Orantes-Hernandez v. Meese*, the district court noted that most Salvadoran immigrants apprehended by immigration agents chose to voluntarily return to El Salvador despite the dangerous conditions in the country. 685 F. Supp. 1488, 1494 (C.D. Cal. 1988). Next, the court found that "[t]he widespread acceptance of voluntary departure is due in large part to the coercive effects of the practices and procedures employed by the INS and the unfamiliarity of most Salvadorans with their rights under . . . immigration law."[3] *Id.* According to the court, even if the Salvadoran immigrants expressed a fear of returning to El Salvador, they were routinely denied their procedural due process rights and forced to sign voluntary departure forms. *Id.* The district court permanently enjoined federal immigration officers from employing coercive tactics to expedite the

[3] The United States Immigration and Naturalization Service ("INS") was an agency of the United States Department of Justice until 2003. In 2003, its functions were transferred to three new entities: U.S. Citizenship and Immigration Services ("USCIS", U.S. Immigration and Customs Enforcement ("ICE"), and U.S. Customs and Border Protection ("CBP")

removal of Salvadoran immigrants. *Id.* at 1513-14. Similarly, in *Perez-Funez v. District Director*, the district court found that immigration agents frequently removed unaccompanied minor aliens through voluntary departure agreements. 619 F. Supp. 656, 657-58 (C.D. Cal. 1985). The evidence also showed, however, that the immigration agents routinely failed to explain to the minor children the effects of their signatures on the voluntary departure forms or their rights under immigration law. *Id.* at 660-61. Holding that these procedures "violate the due process rights of the plaintiff class," the court permanently enjoined federal immigration agents from effectuating minor children's removal through voluntary departure forms without adequately explaining the effects and consequences of their actions. *Id.* at 669-70.

Despite having no legal status in the United States, Laura S. was found in the United States and consequently was entitled to the protections of the Fifth Amendment's due process clause. The Fifth Circuit has repeatedly asserted that the Fifth Amendment's safeguards extend to protect illegal aliens engaged in deportation proceedings. *See, e.g.*, *Zhang*, 432 F.3d at 346; *Nose*, 993 F.2d at 78-79; *Haitian Refugee Ctr.*, 676 F.2d at 1036. In addition to ensuring the provision of certain rights, the Fifth Amendment also guarantees that illegal aliens have the ability to *waive* these rights, provided that any such waiver is made knowingly and voluntarily. *See Nose*, 993 F.2d at 78-79. In the present case, the Fifth Amendment mandated that Laura S. either be provided a hearing before an

immigration judge or the right to knowingly and voluntarily waive such a hearing prior to her deportation.[4] Although Laura S. allegedly waived these rights by signing a voluntary departure form, constitutional standards are satisfied only if that waiver was made knowingly and voluntarily.

Plaintiffs claim, however, that Laura S. did not voluntarily waive her right to a hearing before an immigration judge. Rather, Plaintiffs allege that Laura S. was forced to sign a voluntary departure form even though she repeatedly told Defendants that she feared for her life if she returned to Mexico. As in *Salgado-Diaz* and *Romero-Fereyos*, the actions allegedly taken by Defendants in the present case to secure Laura S.'s signature on a voluntary departure form show that she did not knowingly and willingly agree to the waiver of rights. According to Plaintiffs' complaint, Defendants "made it clear to [Laura S.] that she was returning to Mexico immediately, despite her pleas." [Doc. No. 63 at 7]. Defendants allegedly forced Laura S. to sign a number of papers—one of which was a voluntary departure form—but did not explain the contents of the forms nor the effects of her signature. *Id.* These allegations, if true, would suffice to show that Laura S. did not choose to voluntarily depart the country freely and knowingly, but rather was coerced into giving up her Fifth

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[4] Indeed, Defendants' Motion to Dismiss concedes that Laura S. had the right to: (1) be placed in removal proceedings under 8 U.S.C. § 1229a; (2) voluntarily depart; or (3) be placed in expedited removal. [Doc. No. 67 at 11]. Here, the Plaintiffs claim she received "none of the above" due to Defendants' actions.

Amendment procedural due process rights. Thus, Plaintiffs have sufficiently pled the violation of a constitutional right as necessary to support a *Bivens* claim. Defendants' Motion to Dismiss on this point is denied.

IV. *Bivens* Action

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the plaintiff brought suit against individual federal officers, alleging that the officers violated his Fourth Amendment rights when they performed a warrantless search of his house and arrested him without probable cause. 403 U.S. 388, 389-90 (1971). Ruling on this case, the Supreme Court created a new, but limited, damages remedy that permitted a person "to sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights." *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 622 n. 1 (5th Cir. 2006). In the present case, Plaintiffs' suit is predicated solely on a *Bivens* theory of liability. Plaintiffs seek to recover damages from Defendants for their alleged violation of Laura S.'s right to procedural due process during her deportation proceedings. In response, Defendants argue that the Immigration and Nationality Act, as well as the presence of special factors, counsel against extending a *Bivens* remedy in this case.

Proceeding with a suit premised on a *Bivens* theory of liability is "not an automatic entitlement"; to the contrary, it is disfavored. *Wilkie v. Robbins*, 551 U.S.

537, 550 (2007). In the almost forty-five years since it decided *Bivens*, the Supreme Court has extended it in only two scenarios: for a due process violation in the employment discrimination context, *Davis v. Passman*, 442 U.S. 228 (1979), and for an Eighth Amendment violation committed by federally-employed prison officials, *Carlson v. Green*, 446 U.S. 14 (1980). By the same token, the Supreme Court has reversed more than a dozen appellate decisions that purported to extend *Bivens* to a new context. *See De La Paz v. Coy*, 786 F.3d 367, 372 (5th Cir. 2015). Therefore, courts must "'respond cautiously to suggestions that *Bivens* remedies be extended.'" *Id.* at 373 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988)).

a. New Context

As an initial matter, the Court must decide whether Plaintiffs' suit presents a "new context" for the extension of a *Bivens* remedy. *See Hernandez v. United States*, 757 F.3d 249, 272 (5th Cir. 2014) *vacated in part and reinstated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015). *Bivens* remedies are not extended on an amendment-by-amendment basis. *Id.* The Supreme Court has instead mandated that courts use a context-specific approach when evaluating the extension of a *Bivens* remedy. *See Corr. Servs. Corp. v. Malesko*, 34 U.S. 61, 68 (2001). Essentially, courts are charged with examining "each new 'potentially recurring scenario that has similar legal and factual components.'" *Hernandez*, 757 F.3d at 272 (quoting *Arar v. Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (*en banc*)). If

the Court finds that Plaintiffs' case presents a new context, a full *Bivens* analysis must be made.

The Fifth Circuit has not considered whether a *Bivens* remedy extends to a scenario like that presented in the instant case. It has, however, considered cases that share certain features with the present action. In the immigration context, two Fifth Circuit cases have allowed a *Bivens* claim to proceed to seek remedy for physical abuse allegedly committed against immigration detainees. *See Martinez-Aguero*, 459 F.3d at 620; *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987). In neither of these cases, though, did the Fifth Circuit explicitly decide "whether border patrol agents can be *Bivens* defendants." *De La Paz*, 786 F.3d at 373. Despite their lack of specificity, the Fifth Circuit does "defer to both of these prior decisions, to the extent that they permit *Bivens* actions against immigration officers who deploy unconstitutionally excessive force when detaining immigrants on American soil." *Id.*

In the two most recent *Bivens* cases occuring in an immigration context, the Fifth Circuit has reached contrary results. In *De La Paz v. Coy*, it declined to extend a *Bivens* remedy to a claim involving allegations of Fourth Amendment violations. *See De La Paz*, 786 F.3d at 380. Specifically, the court refused to create a *Bivens* remedy to allow the plaintiffs—both illegal aliens—to seek damages for allegedly unlawful stops and arrests conducted by CBP agents. *Id.* at 369-71. In *Hernandez v. United States*, however, the Fifth Circuit initially extended a *Bivens* remedy in a suit involving a claim against "a federal law enforcement agent for

his conscience-shocking use of excessive force across our nation's border." *Hernandez*, 757 F.3d at 272-73. In *Hernandez*, the defendant, a CBP agent, was standing in the United States when he shot and killed a teenage boy standing across the border in Mexico. *Id.* at 255. *Hernandez* was not an "immigration case," though—when the boy was shot, he was not attempting to immigrate into the United States or otherwise enter the country. *Id.* at 274. The Court notes that certain portions of the Fifth Circuit's opinion in *Hernandez* were later vacated at an *en banc* hearing. *See Hernandez v. United States*, 785 F.3d 117, 120 (5th Cir. 2015).

Although similarities may be drawn between the present case and those described above, the scenario presented in the instant action differs on several fundamental issues. The Fifth Circuit has been presented with *Bivens* cases involving the excessive use of force by CBP agents, as in *Martinez-Aguero* and *Cannatella*. The present case, although involving similar defendants, does not involve allegations of physical abuse, though it does involve allegations of coercion. While in *Hernandez* the *Bivens* action stemmed from the death of a Mexican citizen allegedly caused directly by the actions of a CBP officer, the death of Laura S. was actually caused by a Mexican citizen in Mexico. Finally, the Fifth Circuit in *De La Paz* analyzed a *Bivens* claim in the immigration context stemming from CBP officers' apprehensions of illegal aliens, but did not address issues concerning Fifth Amendment procedural due process. The instant action, while containing certain aspects of the preceding cases, presents a context that

has not yet been considered: whether a plaintiff may bring a *Bivens* claim for damages against CBP agents for a procedural due process violation that occurred in the United States and allegedly led to the death of a Mexican citizen in Mexico at the hands of another Mexican citizen.

b. Extending *Bivens* Action

Having decided that the present case presents a new scenario, the Court "must decide whether to extend a *Bivens* remedy." *De La Paz*, 786 F.3d at 372. The first step in this inquiry is to ask "whether any alternative, existing process for protecting the constitutionally recognized interest amounts to a convincing reason for the Judicial Branch to refrain from providing and new and freestanding remedy in damages." *Minneci v. Pollard*, 132 S. Ct. 617, 618 (2012) (quoting *Wilkie*, 551 U.S. at 550). Second, the Court then asks whether "special factors counsel[] hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396.

i. Alternative Remedies

The purpose of the "alternative remedies" inquiry is "to determine whether Congress has explicitly or implicitly indicated 'that the Court's power should not be exercised.'" *De La Paz*, 786 F.3d at 375 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). The main question for this analysis is whether "an elaborate remedial system that has been constructed step by step, with

careful attention to conflicting policy considerations, should be augmented by the created [sic] of a new judicial remedy." *Bush*, 462 U.S. at 388. To justify denying the imposition of a *Bivens* remedy, it is not necessary that an alternative remedial scheme provide a damages remedy identical to *Bivens*. *De La Paz*, 786 F.3d at 377. Rather, so long as a plaintiff has "an avenue for some redress," the courts need not step in to create an independent remedial scheme. *Malesko*, 534 U.S. at 69.

Courts analyzing the advisability of a *Bivens* remedy in the immigration context have necessarily began their "alternative remedies" inquiry with the Immigration and Nationality Act ("INA"). *See De La Paz*, 786 F.3d at 375; *Mirmehdi v. United States*, 689 F.3d 975, 982 (9th Cir. 2011). The federal government reigns supreme in the realm of immigration and through the INA it has "established a substantial, comprehensive, and intricate remedial scheme in the context of immigration." *Arar v. Ashcroft*, 585 F.3d 559, 572 (2nd Cir. 2009). Enacted in 1952, the INA has frequently been amended by Congress in the intervening sixty-three years. *See De La Paz*, 786 F.3d at 377. But "[d]espite its repeated and careful attention to immigration matters, Congress has declined to authorize damage remedies against individual agents involved in civil immigration enforcement." *Id.*

Denying the claim in *De La Paz*, the Fifth Circuit focused heavily on the INA as a complex remedial scheme that counseled against the imposition of a *Bivens* remedy in the plaintiffs' case. *De La Paz*, 786 F.3d at 375-78. The plaintiffs in *De La Paz*, illegal

aliens, alleged that CBP agents unlawfully stopped their vehicles and arrested them in violation of their Fourth Amendment rights. *Id.* at 370-71. In its analysis, the Fifth Circuit noted that the INA "intricately prescribes" removal procedures, as well as multiple levels of appellate review for final immigration decisions. *Id.* at 375.[5] Further, the Fifth Circuit emphasized that the INA included "provisions specifically designed to protect the rights of illegal aliens," including the rights allegedly violated in that case.[6] *Id.* at 376. Finally, the Fifth Circuit stated that the INA "maintains its own standards of conduct by training individuals in those standards and 'establish[ing] an expedited, internal review process for violations of such standards.'" *Id.* at 376 (quoting 8 U.S.C. § 1357(a)(5)).[7] Declining to extend a *Bivens* remedy to the plaintiffs'

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[5] *See, e.g.*, 8 U.S.C. § 1229 (initiation of removal procedures); 8 U.S.C. § 1229a (removal procedures); 8 U.S.C. § 1229c (voluntary departure); 8 C.F.R. § 1003.1(b) (appellate review of immigration decisions).

[6] Specifically, the Fifth Circuit pointed out that the INA mandates that federal agents may only search a person or his possessions if they "have reasonable cause to suspect that grounds exist for denial of admission to the United States. . . ." *De La Paz*, 786 F.3d at 376 (quoting 8 U.S.C. § 1357(c)). Similarly, the Court emphasized that federal agents "can only make an arrest if they 'ha[ve] reasonable grounds to believe that the person to be arrested has committed or is committing' a felony or immigration violation." *Id.* (quoting 8 U.S.C. § 1357(a)(2)-(5)).

[7] In regards to the available review process, individuals can file complaints regarding actions taken by CBP officers and those officers can be prosecuted criminally for violations of statutory or constitutional law. *De La Paz*, 786 F.3d at 376-77 (citing 8 C.F.R. § 287.10; *United States v. Brugman*, 364 F.3d 613, 614 (5th Cir. 2004)).

claims, the Fifth Circuit held that the INA is "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 377-78. Such a system, the Fifth Circuit stated, "'should not be augmented by the creation of a new judicial remedy.'" *Id.* at 378 (quoting *Bush*, 462 U.S. at 388).

Similarly, in *Mirmehdi v. United States*, the Ninth Circuit focused heavily on the INA when it declined to extend a *Bivens* remedy to a wrongful detention claim in the immigration context. 689 F.3d at 980. Like the Fifth Circuit in *De La Paz*, the Ninth Circuit began its "alternative remedies" analysis by focusing on the "complexity and comprehensiveness" of the INA. *Id.* at 982. The Ninth Circuit also emphasized that the plaintiffs in the case took "full advantage" of the immigration remedies available to them through the INA. *Id.* Thus, the Ninth Circuit also declined to extend a *Bivens* remedy, basing its decision on the presence of the "extensive remedial procedures available to and invoked by [the plaintiffs] . . . " through the INA. *Id.* at 983.

In both *De La Paz* and *Mirmehdi*, the courts' decisions to deny *Bivens* remedies relied extensively on the comprehensiveness of the INA scheme and the remedies it made available to redress the plaintiffs' grievances. On this issue, however, the factual allegations in this case differ markedly. For the plaintiffs in *De La Paz* and *Mirmehdi*, the INA was available for them to seek redress. In the present case, the Defendants' allegedly wrongful actions prevented Laura S. from

utilizing the INA's comprehensive remedial scheme. Plaintiffs argue that Laura S. would have been eligible for various forms of relief from deportation, such as mandatory withholding based on persecution risks in Mexico.[8] Nevertheless, by allegedly coercing Laura S. to sign a voluntary departure form, Defendants essentially denied her access to any remedies that may have been available. It is illogical for Defendants to deny an individual access to a remedial scheme, then claim protection from suit based on the presence of that remedial scheme. Thus the INA is not an "alternative remedial scheme" that justifies denying the imposition of a *Bivens* remedy in this case.[9]

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[8] This Court takes no position on these claims at this juncture.

[9] Further, the typical remedies individuals seek through the INA would be of little value to the Plaintiffs in this case. Claims challenging the constitutionality of deportation proceedings are typically brought by the individual actually engaged in the deportation proceedings. *See, e.g.*, *Silos v. Holder*, 538 F. App'x 426, 432 (5th Cir. 2013) (plaintiff claimed that his incriminating statements made during deportation proceedings were coerced and could not be used against him in violation of his due process rights); *Olabanji v. I.N.S.*, 973 F.2d 1232, 1234-35 (5th Cir. 1992) (plaintiff challenged whether his deportation proceedings complied with due process requirements when he was not allowed to cross-examine witnesses who testified against him). The INA provides substantial remedies to this class of plaintiffs, such as a stay of deportation or a grant of asylum. The Plaintiffs here, however, do not and cannot seek the type of remedy the INA provides—rather, they seek redress for the death of their mother. The INA, which is not designed to remedy this type of harm, does not present Plaintiffs with an alternative remedial scheme. *See also Argueta v. United States Immigration and Customs Enforcement*, No. 08-1652 (PGS), 2009 WL 1307236 (D.N.J. May 7, 2009) (INA

This conclusion finds support in the Second Circuit's decision in *Arar v. Ashcroft*. 585 F.3d 559 (2nd Cir. 2009). In *Arar*, the plaintiff filed a *Bivens* action challenging the government's policy of extraordinary rendition after he was removed to Syria by INS agents and allegedly tortured for information regarding terrorist networks. *Id.* at 565-67. In its "alternative remedies" analysis, the Second Circuit emphasized that "the government took . . . actions that impaired [the plaintiff's] timely ability to seek the judicial review normally afforded under the INA and to receive any meaningful relief." *Id.* at 570. The Second Circuit concluded that, because the plaintiff was prevented from accessing the INA's remedial scheme, "any reliance on the INA as an alternative remedial scheme presents difficulties." *Id.* at 573. The Second Circuit did not fully explore this prong of the *Bivens* inquiry, though, since the presence of "special factors" in the case justified denying the imposition of a *Bivens* remedy. *Id.*

Aside from the INA, Plaintiffs lack any alternative remedy for the violation of Laura S.'s constitutional rights. "[F]ederal law enforcement agencies," "federal homicide statutes," and "criminal civil rights statutes" are insufficient to remedy Plaintiffs' alleged harms. *See Hernandez*, 757 F.3d at 274. Rather, these procedures "at most represent a mere 'patchwork' of remedies insufficient to overcome *Bivens*." *Wilkie*, 551 U.S. 554. A suit in state court also presents no alternative

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was not a remedial scheme precluding a *Bivens* remedy because plaintiff did not challenge his removability, and thus his constitutional claims would not go before an immigration court).

remedy to Plaintiffs, because plaintiffs "ordinarily *cannot* bring state-law tort actions against employees of the Federal Government." *Minneci*, 132 S. Ct. at 623 (emphasis in original). A side from a *Bivens* remedy, no alternative remedial scheme is available to provide redress for Plaintiffs' alleged harms. The Court thus proceeds to the second prong of its *Bivens* analysis.

ii. Special Factors Counseling Hesitation

The next step in the *Bivens* analysis requires the Court to determine whether "any special factors counsel hesitation." The *Bivens* decisions [sic] itself provides "little guidance on what qualifies as a special factor." *Hernandez*, 757 F.3d at 275 (citing *Bivens*, 403 U.S. at 396). In *Hernandez*,[10] the Fifth Circuit provided some guidance on this issue and listed some of the "special factors" other courts have identified as precluding a *Bivens* remedy: sensitive government work in the military context; actions taken during the War on Terror; and the workability of a cause of action. *Id.* (citing *Wilkie*, 551 U.S. at 555; *United States v. Stanley*, 483 U.S. 669, 683-84 (1987); *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012)). Particularly relevant to the

[10] Fifth Circuit jurisprudence provides little guidance regarding *Bivens* claims in the immigration context. Thus although the Fifth Circuit's *Bivens* analysis in *Hernandez* was later vacated, the Court may rely on the Fifth Circuit's delineation of *Bivens* law in *Hernandez* to assist in the analysis of Plaintiffs' claim. *See United States v. Cisneros*, 456 F. Supp. 2d 826, 839 (S.D. Tex. 2006) (citing *Marathon Oil Co. v. Ruhrgras*, 145 F.3d 211, 225 n.23 (5th Cir. 1998)) ("A vacated decision, while persuasive, is no longer binding precedent.")

present case, the *Hernandez* court noted that the Ninth Circuit had previously identified "'immigration issues' writ large as necessarily creating a special factor counseling hesitation." *Id.* (quoting *Mirmehdi*, 689 F.3d at 982). Focusing on the "complexity and comprehensiveness" of the INA scheme, the Ninth Circuit in *Mirmehdi* held that "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation. . . .'" *Mirmehdi*, 689 F.3d at 982 (quoting *Arar*, 585 F.3d at 574). Declining to disrupt the INA's comprehensive remedial scheme and its balance of competing governmental interests, the Ninth Circuit held that the presence of immigration issues in *Mirmehdi* counseled against the extension of a *Bivens* remedy.

Though the present case also involves immigration issues, the presence of these factors alone does not necessarily prevent the extension of a *Bivens* remedy. First, the Fifth Circuit has previously declined to follow *Mirmehdi*'s categorical designation of immigration issues as a "special factor counseling hesitation." *See Hernandez*, 757 F.3d at 265. Specifically, the Court in *Hernandez* stated that the Ninth Circuit's designation "unjustifiably extends the special factors identified in *Arar* well beyond that decision's specific national security 'context of extraordinary rendition.'" *Id.* (quoting *Arar*, 585 F.3d at 574). Though the Fifth Circuit ultimately held that *Hernandez* was "not an immigration case," it also stated that it "would not follow *Mirmehdi*'s analysis" even if immigration issues were present. *Id.* at 274-75. Thus in the present case, too, the presence

of an immigration issue, in and of itself, does not lead one to conclude that an extension of a *Bivens* remedy should be denied.

Second, although the INA is intended to operate as a comprehensive immigration scheme, courts have previously intruded into its domain to ensure that deportation proceedings comport with constitutional standards. *See Orantes-Hernandez*, 685 F. Supp. at 1513-14; *Perez-Funez*, 619 F. Supp. at 669-70. As discussed in the above section, California district courts have twice entered injunctions barring the INS from using coercive tactics or misrepresentations to secure signatures on voluntary departure forms, and to ensure that the aliens signing the forms were aware of the consequences of their actions. *Id.* Similarly, the Fifth Circuit in *Haitian Refugee Center v. Smith* upheld an injunction barring the INS from using procedures that impeded aliens' ability to seek asylum. 676 F.2d at 1031-32. Aliens engaged in deportation proceedings are often unfamiliar with United States immigration law and do not speak English, and are thus particularly vulnerable to coercive tactics or misrepresentations that may deprive them of their constitutional rights. *See Lanuza v. Love*, No. C14-1641 MJP, 2015 WL 11282132 (W.D. Wash. March 20, 2015) ("If a *Bivens* remedy is not available wherever a non-citizen has the ability to seek review of an immigration decision, there is little to deter immigration officials from presenting false evidence or testimony during immigration proceedings or from otherwise compromising the integrity of such proceedings. . . ."). Thus it is often

necessary for courts to exercise their judicial power in this area to ensure compliance with constitutional standards and to protect the rights of aliens in this country.

Third, as noted in *Hernandez*, the "Supreme Court has recently written to emphasize the strong national interest Congress has in protecting aliens from mistreatment." *Hernandez*, 757 F.3d at 276 (citing *Arizona v. United States*, 132 S.Ct. 2492, 2498 (2012)). Specifically, the Supreme Court has stated that "[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad." *Arizona*, 132 S. Ct. at 2498. In *Arizona v. United States*, this national interest in aliens' rights justified a uniform immigration policy instituted at the federal level. *Id.* at 2498-99. In *Hernandez*, the Fifth Circuit noted that this same interest "militates in favor of the availability of some federal remedy for mistreatment at the hands of those who enforce our immigration laws." *Hernandez*, 757 F.3d at 276. Thus the presence of immigration issues does not singularly require the denial of a *Bivens* remedy. Rather, a *Bivens* remedy may be necessary to ensure compliance with the INA and constitutional standards and to protect the rights of a particularly vulnerable class.

Aside from issues of immigration law, other concerns identified by the Fifth Circuit regarding the extension of a *Bivens* remedy do not counsel hesitation in this case. In *De La Paz*, the Fifth Circuit noted that a *Bivens* remedy for the plaintiffs' Fourth Amendment violations was unlikely to provide any meaningful

compensation. *De La Paz*, 786 F.3d at 378-79. Even though the plaintiffs may have been searched and arrested without the necessary "reasonable suspicion" required by the law, their damages were likely to be minimal "precisely because they ha[d] no right not to be detained." *Id.* at 379. Because the plaintiffs were illegal aliens, they were removable regardless of whether their apprehensions violated their Fourth Amendment rights, and would thus be entitled to little compensation. *Id.* In the present case, however, the damages to remedy the alleged harm would not necessarily be minimal. Assuming that the Plaintiffs can demonstrate all the elements of their claim, including causation, they would be entitled to recover damages for the death of their mother—an injury more concrete and compensable than the Fourth Amendment injuries in *De La Paz*.[11]

The *De La Paz* opinion also expressed concerns about "deter[ing] [sic] agents from vigorous enforcement and investigation of illegal immigration." *Id.* The facts of *De La Paz* warranted this concern, since the extension of a *Bivens* remedy to cover illegal stops and arrests would likely make immigration agents overly-cautious when exercising their duty to apprehend illegal aliens. The extension of a *Bivens* remedy in the present case is unlikely to create a similar burden on

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[11] Defendants in a catch-all argument suggest that Laura S.'s claims are not cognizable in the courts of the United States. The Court will take up this and any other remaining issues not resolved by this Order if and when any parties file a Rule 56 motion.

those charged with enforcing immigration laws. First, the procedures used to apprehend and arrest suspected illegal immigrants are wholly separate from those involved in securing voluntary departures. Unlike *De La Paz*, the Court in the present case is not asked to second-guess the judgments made by immigration agents during the apprehension of illegal aliens—judgments often made in tumultuous situations that leave little or no time for careful deliberation. Rather, the Court here is simply asked to review whether certain established constitutional procedures were violated. Second, the Court's analysis of the procedures used to secure Laura S.'s consent to voluntary departure will not alter or increase the duties of immigration agents in future voluntary departure proceedings. Immigration agents already have the duty to refrain from using undue pressure or coercion when questioning aliens. Finally, protecting aliens' due process rights is an area in which courts have previously intervened to ensure compliance with constitutional laws. *See Haitian Refugee Center*, 676 F.2d at 1031-32; *Orantes-Hernandez*, 685 F. Supp. at 1513-14; *Perez-Funez*, 619 F. Supp. at 669-70. Though the previously-cited cases effectuated broad relief in the form of injunctions issued against the INS, the courts did not express concerns that their oversight in the area of voluntary departure would create a chilling effect regarding the enforcement of immigration laws. Thus the facts of the present case similarly do not give rise to concerns regarding the continued enforcement of immigration laws.

Finally, the Fifth Circuit has also expressed concerns that a *Bivens* remedy in the immigration context would "yield a tidal wave of litigation." *De La Paz*, 786 F.3d at 379. In *De La Paz*, the Court reasoned that it would be an "easy exercise" for aliens to file suits alleging that there had been "no reasonable suspicion for their stops, arrests, or detentions." *Id.* at 380. Such litigation, the court explained, would "cripple immigration enforcement with the distraction, cost, and delay of lawsuits. . . ." *Id.* The same concern is present to some extent in the instant case. An extension of a *Bivens* remedy to Plaintiffs' claim may seem to pave the way for others who initially acquiesced to a voluntary departure, but later have a change of heart and seek to re-litigate that departure or claim damages based upon that departure. Hypothetically, by merely alleging confusion or coercion, an alien could proceed with a federal case challenging his voluntary departure and ultimately costing the government significant time and resources in an area that it can least afford it. Such a suit would likely devolve into a swearing match between the opposing parties and could truly impede the proper administration of border protection.

While this prospect would counsel against the extension of a *Bivens* remedy, this case presents several unique factors that would significantly limit its precedential value to those seeking to challenge their own voluntary departures. First, the claim in the present case is not brought by Laura S. Were Laura S. alive to challenge her voluntary departure, redress would be properly sought through the INA rather than through

a *Bivens* claim. The INA is a remedial scheme designed specifically to remedy harms caused by a coerced voluntary departure, such as by issuing a stay of deportation. Thus the extension of a *Bivens* remedy in the current case will not aid plaintiffs seeking to challenge their *own* voluntary departures—rather, those plaintiffs can properly seek redress through the INA.

Second, Laura S.'s allegedly expressed fears of being sent back to Mexico, if true, clearly had merit. Less than a week after returning to Mexico, Laura S. was killed by the same person she had allegedly told Defendants that she feared. Plaintiffs are not alleging that Laura S. asserted vague, unverifiable fears—but rather concrete fears eventually proved to be accurate. Finally, if Plaintiffs are denied an extension of a *Bivens* remedy for the violation of Laura S.'s procedural due process rights, then Plaintiffs have absolutely no recourse for the alleged harms they suffered. Had Laura S. lived, she would have been able to seek recourse for the alleged due process violations through the INA's remedial scheme. It is nonsensical to conclude that, because her fears were actualized and resulted in her death, the estate of Laura S. and her children are therefore without a remedy.

In conclusion, a *Bivens* remedy is the only remedy available to the Plaintiffs in this suit—no other alternative remedial scheme would redress their harms. Further, given this very unique fact pattern, no special factors counsel hesitation and persuade against the imposition of such a remedy in this case. Therefore, the Court extends a *Bivens* action in this specific context

in which the Plaintiffs assert a claim for the death of their mother allegedly caused by the deprivation of her procedural due process rights during deportation proceedings. Defendants' Motion to Dismiss on this point is denied.

V. Qualified Immunity

Finally, Defendants assert that Plaintiffs' suit should be dismissed because of the doctrine of qualified immunity. Qualified immunity insulates government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To avoid qualified immunity, a plaintiff must satisfy both prongs of a two-prong test. *E.A.F.F. v. Gonzalez*, 600 F. App'x 205, 209 (5th Cir. 2015). "First, a court must decide whether a plaintiff's allegation[s], if true, established a violation of a clearly established right." *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 879 (5th Cir. 2004). Second, "a court must decide whether the conduct was objectively reasonable in light of clearly established law at the time of the incident." *E.A.F.F.*, 600 F. App'x at 209.

A defendant's assertion of qualified immunity "'alters the usual . . . burden of proof.'" *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015) (quoting *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010)). When a government official asserts the defense, "the burden shifts to

the plaintiff to show that the defense is not available." *Id.* The plaintiff therefore bears the burden of proof to show "a genuine and material dispute as to whether the official is entitled to qualified immunity." *Id.*

In regards to the first prong of the qualified immunity analysis, the Plaintiffs' allegations, taken as true, establish a violation of Laura S.'s clearly established constitutional rights. As discussed above, the Fifth Circuit has repeatedly held that illegal aliens are entitled to procedural due process in deportation proceedings. *See Zhang*, 432 F.3d at 346; *Nose*, 993 F.2d at 78-79; *Haitian Refugee Ctr.*, 676 F.2d at 1036. The Due Process Clause "forbids the state from 'arbitrarily . . . causing an alien who has entered the country . . . illegally to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.'" *United States v. Benitez-Villafuerte*, 186 F.3d 651, 656 (5th Cir. 1999) (quoting *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903)). Though an alien may waive her rights under the Due Process Clause, any such waiver must be made knowingly and voluntarily. *Nose*, 993 F.2d at 79.

Here, Plaintiffs' allegations claim that Laura S. did not knowingly and willingly sign the voluntary departure form. Rather, Plaintiffs allege that Defendants coerced Laura S. into signing the form and giving up any rights she may have had to seek relief from deportation. As courts have previously held, an involuntary or coerced waiver of rights is not effective and constitutes a deprivation of procedural due process. *See, e.g.*,

Salgado-Diaz, 395 F.3d at 1163 (INS agents misrepresented effect of alien's signature on voluntary departure form, violating his procedural due process rights); *Romero-Fereyos*, 221 F. App'x at 164 (federal agents violated the plaintiff's procedural due process rights when they confiscated his glasses and had him subsequently sign a removal form); *Orantes-Hernandez*, 685 F. Supp. at 1494 (court entered injunction to prevent INS agents from using coercive tactics to gain aliens' consent to voluntary departures); *Perez-Funez*, 619 F. Supp. at 657-58 (court entered injunction to ensure that INS agents explained effects of voluntary departure form to illegal aliens). Satisfying the first prong necessary to waive Defendants' qualified immunity, Plaintiffs allegations, taken as true, establish a violation of Laura S.'s clearly established right to procedural due process.[12]

The second prong of the qualified immunity analysis requires the court to evaluate whether Defendants' conduct was objectively reasonable in light of clearly established law at the time of the incident. For this inquiry, "the central concept is that of 'fair warning.'" *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)). A defendant's conduct is not objectively reasonable if "prior decisions gave reasonable warning that the

[12] The recent *en banc* decision by the Fifth Circuit in *Hernandez*, does not alter this conclusion. In that case, the question was whether a Mexican citizen in Mexico had clearly established constitutional rights. The present case involves a Mexican citizen in the United States, albeit illegally, whose rights were allegedly violated in the United States.

conduct then at issue violated constitutional rights." *Id.* (quoting *Hope*, 536 U.S. at 740). When analyzing prior decisions, the Court "considers the status of the law both in our circuit and in our sister circuits at the time of the defendants' actions." *Kovacic v. Villarreal*, 628 F.3d 209, 214 (5th Cir. 2010).

Here, prior decisions have given Defendants reasonable warning that coercing illegal aliens to sign voluntary departure forms violates those aliens' constitutional rights. The Fifth Circuit has repeatedly held that illegal aliens are entitled to due process protections in immigration proceedings, including the right to a hearing. *See Zhang*, 432 F.3d at 346; *Nose*, 993 F.2d at 78-79; *Haitian Refugee Ctr.*, 676 F.2d at 1036. In *Salgado-Diaz v. Gonzalez*, the Ninth Circuit considered a case with facts similar to those in the present case. 395 F.3d at 1163. The plaintiff in *Salgado-Diaz* alleged that his due process rights were violated when INS agents misrepresented the effect of his signature on a voluntary departure form, instead telling him that it was necessary to look up his pending immigration proceedings. *Id.* at 1160, 1163. The Ninth Circuit held that these actions constituted a deprivation of the plaintiff's procedural due process rights, and essentially "denied [the plaintiff] his day in court." *Id.* at 1163; *see also Romero-Fereyos*, 221 F. App'x at 164 (federal agents violated the plaintiff's procedural due process rights when they confiscated his glasses and had him subsequently sign a removal form). Similarly, two decisions from district courts in California have issued injunctions to ensure that the INS's voluntary

departure procedures comply with constitutional standards. *See Orantes-Hernandez*, 685 F. Supp. at 1494; *Perez-Funez*, 619 F. Supp. at 657-658. The court in *Orantes-Hernandez*, considered facts similar to the allegations in the present case, and found that INS agents were routinely coercing EI Salvadoran immigrants into signing voluntary departure forms even though the EI Salvadorans often expressed a fear of returning to their native country. *Orantes-Hernandez*, 685 F. Supp. at 1494. *See also Haitian Refugee Ctr.*, 676 F.2d at 1032-1032 (Fifth Circuit upheld an injunction barring the INS from using procedures that impeded aliens' ability to seek asylum). In fact, this Court has not found, nor has it been cited to, any case from any jurisdiction that holds that an officer can coerce an illegal alien into giving up her rights.

As this recitation shows, it is well-established in this circuit that deportation proceedings must conform to the requirements of the Due Process Clause. Further, cases considering scenarios similar to that alleged in the present case have routinely held that illegal aliens cannot be coerced into waiving their Fifth Amendment right to procedural due process. Thus Defendants in the present case were given a "fair warning" that their alleged conduct, if true, was not objectively reasonable.

To conclude, Plaintiffs' allegations suffice to waive Defendants' qualified immunity; or, more likely when the Defendants contest the allegations, raise an question of fact for the jury. *See Waganfeald v. Gusman*, 674 F.3d 475, 483-84 (5th Cir. 2012) (If the Court does not

resolve qualified immunity before trial, it is submitted to the jury, and the jury is charged with determining the reasonableness of the defendant's conduct by construing the facts in dispute.). Nevertheless, before the issue of qualified immunity in this case is resolved or deemed a jury question, the Court requires further factual development to ensure that the allegations in the present case will be supported by evidence sufficient to raise a question of fact. The Fifth Circuit has prescribed the procedure for district courts to follow if further factual development is necessary to ascertain the applicability of qualified immunity in a case. *See Zapata v. Melson*, 750 F.3d 481, 485 (5th Cir. 2014). First, "a district court must . . . find 'that the plaintiffs [sic] pleadings assert facts which, if true, would overcome the defense of qualified immunity.'" *Id.* at 485 (quoting *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 994 (5th Cir. 1995)). Second, if the court requires further clarification of the facts to rule on qualified immunity, "it may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.'" *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (quoting *Lion Boulos v. Wilson*, 834 F.2d 504, 507-08 (5th Cir. 1987)); *see also Zantiz v. Seal*, No. 14-30069, 2015 WL 727996 (5th Cir. Feb. 20, 2015). This discovery order must "identify any questions of fact [the district court] need[s] to resolve before it would be able to determine whether the defendants were entitled to qualified immunity." *Zapata*, 750 F.3d at 485.

As discussed above, the allegations contained in Plaintiffs' complaint, if taken as true, are sufficient to overcome Defendants' qualified immunity defense. The

Court has no way of knowing at this stage if the Plaintiffs can prove any of the allegations they have made. Further, there are significant issues of causation which will also need to be resolved. The former could rule out (or in) immunity—the latter could obviously dispose of the entire case. Because the Court needs further factual development before fully resolving the issue of qualified immunity, it will issue a narrowly tailored discovery order aimed at uncovering only the facts necessary to rule on Defendants' defense. Defendants' Motion to Dismiss on this point is denied.

VI. Conclusion

In their Motion to Dismiss [Doc. No. 67], Defendants assert four grounds they argue warrant the dismissal of Plaintiffs' suit. As discussed above, the Court finds that none of the four grounds warrant the dismissal of Plaintiffs' suit. Defendants' Motion to Dismiss [Doc. No. 67] is **DENIED**. All discovery in the suit is stayed pending the Court's issuance of a discovery order tailored to uncover the facts necessary to resolve the issue of Defendants' qualified immunity. The Parties are to meet and confer and see if they can agree on a proposed discovery order. The result of that meeting should be reported to the Court by July 31, 2015.

Signed this 15th day of July, 2015.

/s/ Andrew S. Hanen
Andrew S. Hanen
United States District Judge

U.S.C.A. Const. Amend. V.
Due Process clause

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

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8 U.S.C.A. § 1229c.
Voluntary departure

(a) Certain conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

(2) Period

(A) In general

Subject to subparagraph (B), permission to depart voluntarily under this subsection shall not be valid for a period exceeding 120 days.

(B) Three-year pilot program waiver

During the period October 1, 2000, through September 30, 2003, and subject to subparagraphs (C) and (D)(ii), the Attorney General may, in the discretion of the Attorney General for humanitarian purposes, waive application of subparagraph (A) in the case of an alien –

(i) who was admitted to the United States as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) under the provisions of the visa waiver pilot program established pursuant to section 1187 of this title, seeks the waiver for the purpose of continuing to receive medical treatment in the United States from a physician associated with a health care facility, and submits to the Attorney General –

(I) a detailed diagnosis statement from the physician, which includes the treatment being sought and the expected time period the alien will be required to remain in the United States;

(II) a statement from the health care facility containing an assurance that the alien's treatment is not being paid through any Federal or State public health assistance, that the alien's account has no outstanding balance, and that such facility will notify the Service when the alien is released or treatment is terminated; and

(III) evidence of financial ability to support the alien's day-to-day expenses while in the United States (including the expenses of any family member described in clause (ii)) and evidence that any such alien or

family member is not receiving any form of public assistance; or

(ii) who –

(I) is a spouse, parent, brother, sister, son, daughter, or other family member of a principal alien described in clause (i); and

(II) entered the United States accompanying, and with the same status as, such principal alien.

(C) Waiver limitations

(i) Waivers under subparagraph (B) may be granted only upon a request submitted by a Service district office to Service headquarters.

(ii) Not more than 300 waivers may be granted for any fiscal year for a principal alien under subparagraph (B)(i).

(iii)(I) Except as provided in subclause (II), in the case of each principal alien described in subparagraph (B)(i) not more than one adult may be granted a waiver under subparagraph (B)(ii).

(II) Not more than two adults may be granted a waiver under subparagraph (B)(ii) in a case in which –

(aa) the principal alien described in subparagraph (B)(i) is a dependent under the age of 18; or

(bb) one such adult is age 55 or older or is physically handicapped.

(D) Report to Congress; suspension of waiver authority

(i) Not later than March 30 of each year, the Commissioner shall submit to the Congress an annual report regarding all waivers granted under subparagraph (B) during the preceding fiscal year.

(ii) Notwithstanding any other provision of law, the authority of the Attorney General under subparagraph (B) shall be suspended during any period in which an annual report under clause (i) is past due and has not been submitted.

(3) Bond

The Attorney General may require an alien permitted to depart voluntarily under this subsection to post a voluntary departure bond, to be surrendered upon proof that the alien has departed the United States within the time specified.

(4) Treatment of aliens arriving in the United States

In the case of an alien who is arriving in the United States and with respect to whom proceedings under section 1229a of this title are (or would otherwise be) initiated at the time of such alien's arrival, paragraph (1) shall not apply. Nothing in this paragraph shall be construed as preventing such an alien from withdrawing the

application for admission in accordance with section 1225(a)(4) of this title.

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that –

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

(2) Period

Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

(3) Bond

An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.

(c) Aliens not eligible

The Attorney General shall not permit an alien to depart voluntarily under this section if the alien was previously permitted to so depart after having been found inadmissible under section 1182(a)(6)(A) of this title.

(d) Civil penalty for failure to depart

(1) In general

Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien –

(A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and

(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.

(2) Application of VAWA protections

The restrictions on relief under paragraph (1) shall not apply to relief under section 1229b or 1255 of this title on the basis of a petition filed by

a VAWA self-petitioner, or a petition filed under section 1229b(b)(2) of this title, or under section 1254(a)(3) of this title (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.

(3) Notice of penalties

The order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection.

(e) Additional conditions

The Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection.

(f) Judicial review

No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b), nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure.

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8 C.F.R. § 240.25

Voluntary departure – authority of the Service

(a) Authorized officers. The authority contained in section 240B(a) of the Act to permit aliens to depart voluntarily from the United States may be exercised in lieu of being subject to proceedings under section 240 of the Act by district directors, assistant district

directors for investigations, assistant district directors for examinations, officers in charge, chief patrol agents, the Deputy Executive Associate Director for Enforcement and Removal Operations, the Director of the Office of Juvenile Affairs, service center directors, and assistant service center directors for examinations.

(b) Conditions. The Service may attach to the granting of voluntary departure any conditions it deems necessary to ensure the alien's timely departure from the United States, including the posting of a bond, continued detention pending departure, and removal under safeguards. The alien shall be required to present to the Service, for inspection and photocopying, his or her passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. The Service may hold the passport or documentation for sufficient time to investigate its authenticity. A voluntary departure order permitting an alien to depart voluntarily shall inform the alien of the penalties under section 240B(d) of the Act.

(c) Decision. The authorized officer, in his or her discretion, shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days. Every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action – Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions.

(d) Application. Any alien who believes himself or herself to be eligible for voluntary departure under this section may apply therefor at any office of the Service. After the commencement of removal proceedings, the application may be communicated through the Service counsel. If the Service agrees to voluntary departure after proceedings have commenced, it may either:

(1) Join in a motion to terminate the proceedings, and if the proceedings are terminated, grant voluntary departure; or

(2) Join in a motion asking the immigration judge to permit voluntary departure in accordance with § 240.26.

(e) Appeals. An appeal shall not lie from a denial of an application for voluntary departure under this section, but the denial shall be without prejudice to the alien's right to apply to the immigration judge for voluntary departure in accordance with § 240.26 or for relief from removal under any provision of law.

(f) Revocation. If, subsequent to the granting of an application for voluntary departure under this section, it is ascertained that the application should not have been granted, that grant may be revoked without advance notice by any officer authorized to grant voluntary departure under § 240.25(a). Such revocation shall be communicated in writing, citing the statutory basis for revocation. No appeal shall lie from revocation.