No. _____

In The

Supreme Court of the United States

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

Petitioners,

v.

RAMIRO GARZA, Agent of U.S. Customs and Border Protection, in his individual capacity,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Fifth Circuit improperly weigh evidence and fail to draw factual inferences in favor of the nonmoving party when it determined that a U.S. Customs and Border Protection agent was entitled to qualified immunity in a suit brought by surviving minor children who allege that the agent intentionally coerced their mother into departing the United States for Mexico, where she was soon thereafter killed by a violent former partner?

2. Did the Court of Appeals for the Fifth Circuit err when it declined to extend an implied right of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ("*Bivens*") to children who alleged that their mother was coerced into relinquishing her right to apply for protection against removal under the Immigration and Nationality Act ("INA")?

PARTIES TO THE PROCEEDINGS

Petitioners are the original Plaintiffs in this case: minors E.H.F. and S.H.F., represented by their next friend, Maria S., and A.S.G.

Respondent is an original named Defendant in this case: U.S. Customs and Border Protection agent Ramiro Garza in his individual capacity.

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PETITION FOR A WRIT OF CERTIORARI

Minors E.H.F. and S.H.F., represented by their next friend, Maria S., and A.S.G. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, App. 1-15, is reported at 912 F.3d 724. The District Court's order granting Respondent's motion for summary judgment, App. 16-83, is reported at 267 F. Supp. 3d 923. The District Court's order denying Respondent's motion to dismiss, App. 88-126, is unreported and available at 2015 WL 4394745.

JURISDICTION

The Court of Appeals entered its decision and final judgment in this case on January 4, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Section 240B(a)(1) of the Immigration and Nationality Act provides that: "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." 8 U.S.C. § 1229c(a)(1).

STATEMENT OF THE CASE

This case presents important legal issues relevant to the frequently utilized and occasionally abused practice of administrative voluntary departure, or "voluntary return," for undocumented individuals living near the U.S.-Mexico border.

I. Voluntary return is a summary immigration enforcement tool that typically eludes oversight.

In immigration enforcement, a voluntary departure is akin to a plea bargain where a person suspected of being in the United States in violation of the immigration laws "knowingly waive[s] his right to a hearing in exchange for being able to depart voluntarily" instead of potentially being removed. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 553 (9th Cir. 1990). Two types of voluntary departures are authorized by 8 U.S.C. § 1229c(a)(1). The first type – known simply

as "voluntary *departure*" – occurs at the end of formal removal proceedings under 8 U.S.C. § 1229a and is supervised by an immigration judge. *See* 8 U.S.C. § 1229c(a)(1); *see also* 8 C.F.R. § 1240.26. This case is about the second type.

Administrative voluntary departure – or "voluntary *return*" – is a summary immigration enforcement procedure used against certain non-citizens who are not a priority for removal through formal proceedings under 8 U.S.C. § 1229a. Voluntary return is implemented by frontline immigration agents prior to and "in lieu of" removal proceedings. 8 U.S.C. § 1229c(a)(1). By law, the procedure is available only when requested and when the individual subject to the procedure "agrees to its terms and conditions." 8 C.F.R. § 240.25(c).[1] Individuals subject to voluntary return lose important procedural and substantive protections against removal available in formal removal proceedings under the INA. They forego *Miranda*-type advisals of the reason for their arrest and the right to be represented by a lawyer. *See* 8 U.S.C. § 1229a(b)(4)(A); *see also* 8 C.F.R. § 287.3(c). They relinquish the right to hear the government's evidence, cross-examine witnesses, and present their own evidence against removal. 8 U.S.C. § 1229a(b)(4)(B). They also waive the

[1] All decisions regarding voluntary return "shall be communicated in writing" on a specific form promulgated by the U.S. Department of Homeland Security called "Form I-210." 8 C.F.R. § 240.25(c). In this case and in other cases challenging the use of voluntary return, immigration agents utilize a different form – Form I-826 – to obtain signatures later offered as proof that the subject voluntarily departed the United States. App. 26.

protection against removal without "clear and convincing evidence" of removability. 8 U.S.C. § 1229a(c)(3)(A). Because voluntary return occurs out of view of immigration judges, individuals subject to the procedure do not receive crucial information about how to apply for different forms of relief from removal, including asylum, withholding of removal, and protections under the Convention Against Torture. 8 C.F.R. §§ 208.16-18, 1240.11(a)(2), and 1240.11(c).

Administrative voluntary departure has been the subject of repeated federal litigation in which plaintiffs allege widespread abuse and coercion. *See Lanuza v. Love*, 899 F.3d 1019, 1034 (9th Cir. 2018); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619-20 (9th Cir. 2006); *Salgado-Diaz v. Gonzalez*, 395 F.3d 1158, 1163 (9th Cir. 2005); *Lopez-Flores v. Ibarra et al.*, No. 1:17-CV-00105 (S.D. Tex. Jan. 22, 2018); *Perez-Funez v. District Director, I.N.S.*, 611 F. Supp. 990, 996, 1002-03 (C.D. Cal. 1984); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 359-63 (C.D. Cal. 1982).

II. Petitioners' claim in this case arises out of the coerced return of their mother, Laura S., to Mexico.

The Petitioners in this case are the biological children of Laura S., two of them minors who appear through their next friend Maria S., and one who recently reached adulthood. Laura S. was the victim of brutal domestic violence at the hands of her

ex-boyfriend, Sergio H.[2] She obtained a protective order against him and he was eventually jailed and removed to Mexico. S. App. 29, 39. In June of 2009 Laura S. was stopped for a minor traffic violation. S. App. 41. Local police alerted immigration officials when she and other passengers were unable to produce documents indicating their lawful presence in the United States. S. App. 42. Respondent arrived on the scene and soon began processing Laura S. and the other undocumented passengers for voluntary returns to Mexico. Laura S. repeatedly refused to sign documents consenting to a voluntary return, S. App. 17, and clearly expressed her profound fear at the prospect of being returned to the same town as her violent ex-boyfriend. S. App. 2, 10-13, 28-31, 43-44. Petitioners allege that Respondent coerced Laura S. into signing voluntary return forms and departing for Mexico in the early morning hours of June 9, 2009, despite her pleas to remain in the United States. Days later, Laura S.'s abusive ex-boyfriend murdered her, just as she had feared all along. S. App. 35-36, 47-48. Her incinerated remains were found in an abandoned vehicle in a remote area near Reynosa, Tamaulipas, Mexico. *Id.* Petitioners were two, three, and eight years old at the time of her death. They brought suit pursuant to *Bivens* alleging that Respondent intentionally removed Laura S. from the United States in violation of due process. App. 88.

This petition presents the question of whether the Fifth Circuit and district court departed from

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[2] In certain parts of the record, Laura S. is referred to as "Karina" or as "Laura Flores" and Sergio H. is referred to as "Misael."

well-established summary judgment standards in reviewing evidence related to Respondent's qualified immunity claim. Both lower courts disregarded competent summary judgment evidence, including important witness testimony, and made numerous fact determinations in favor of Respondent. Because the courts failed to construe evidence in favor of Petitioners, the non-moving party, their grant and affirmance of qualified immunity conflicts with numerous relevant decisions of this Court, including recent articulations of the summary judgment standard when determining qualified immunity in *Tolan v. Cotton*, 572 U.S. 650 (2014) and *District of Columbia v. Wesby*, 138 S. Ct. 557 (2018). *See* SUP. CT. R. 10(c) (appeals court decisions in "conflict[] with relevant decisions of this Court" are a consideration in granting a petition for writ of *certiorari*).

This petition also presents the question, raised *sua sponte* by the Fifth Circuit, of whether a *Bivens* remedy extends to Respondent's conduct after this Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). The Fifth Circuit's analysis would effectively bar the application of *Bivens* outside of the factual circumstances of that case and undermines this Court's clear intention for that judicially implied remedy to remain a "fixed principle in the law," particularly in the "common and recurrent sphere of law enforcement," *Abbasi*, 137 S. Ct. at 1857, and when the remedies are "damages or nothing." *Bivens*, 403 U.S. at 410.

III. The evidentiary record at the summary judgment stage.

On June 9, 2009, Laura S. was pulled over by local law enforcement in Pharr, Texas, a small city on the U.S.-Mexico border. S. App. 7-8, 41-42. The police officer asked the passengers to produce identification. *Id.* Laura S. and two other passengers, Saray[3] and Arturo, were Mexican nationals living in the United States without authorization at the time. S. App. 42. When they were unable to produce identification indicating their lawful presence in the United States, the police officer contacted U.S. Customs and Border Protection ("CBP") officials. S. App. 8, 42. Respondent, CBP agent Ramiro Garza, arrived on the scene and began to question Laura S. and the other passengers about their status in the country. App. 3, 21-22.

Laura S. was twenty-two years old. She was the mother of three minor children, two of whom are U.S. citizens born to Laura S. and Sergio H. S. App. 5, 51. After meeting as teenagers, Laura S. and Sergio H. became romantically involved and, beginning around 2005, lived together in Texas. S. App. 55. Sergio H. was using drugs and alcohol. S. App. 38, 48-49, 51, 52. He frequently battered Laura S. S. App. 4-6, 38-39, 50. At one point he tried to set fire to their trailer while she and the children were inside. S. App. 39. In 2008, Sergio H. was arrested for domestic violence and Laura S. obtained a Magistrate's Order of Emergency

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[3] In certain parts of the record, Saray is referred to as "Cardiel."

Protection against him on behalf of herself and her children; Sergio H. was jailed and subsequently deported to Mexico. App. 20; S. App. 39. Sergio H. told Laura S. that if she returned to Mexico he would kill her. S. App. 4, 39-40. Friends and family soon saw him in Reynosa, armed and apparently involved with the cartels. S. App. 42, 52, 53.

When Respondent arrived at the scene and started questioning Laura S. about her legal status, she began to shake with fear. S. App. 43. Laura S., crying and trembling, repeatedly told Respondent that her violent former partner had vowed to kill her if she ever returned to Mexico. S. App. 2, 11, 13, 17, 43, 65-66. She explained that he had battered her and that she had obtained a protective order against him. S. App. 29, 43, 65. On hearing Laura S.'s impassioned pleadings, Respondent laughed. S. App. 43. One of the other passengers, Laura S.'s cousin, repeated Laura S.'s statements to Respondent in English to ensure that he understood Laura S.'s fear of returning to Mexico. *Id.*

Respondent ordered Laura S., Saray, and Arturo into his vehicle and told them that they had to go to Mexico. S. App. 11, 62. In transit, Laura S. continued crying and begged Respondent not to send her to Mexico because she was in danger, and Respondent laughed at her again. S. App. 12. Respondent took them to the CBP processing center in Weslaco, Texas. App. 21-22.

At the CBP processing center, Saray and Laura S. were seated together. S. App. 13. Respondent left his

handgun outside, but still had his taser and baton with him. S. App. 69. He was soon joined by another CBP agent, who was armed with a handgun. App. 22; S. App. 2, 14, 18. By that time, it was nearly 4:00 a.m. and any delays in processing could have meant that the agents would have had to stay on for "administrative uncontrollable overtime," resulting in a ten-hour shift. S. App. 70-71. Respondent said to the other CBP agent, in Spanish, that Laura S. and Saray had to sign documents because the agents were in a rush and that the agents needed to leave. S. App. 2, 14-15. The CBP agents handed Laura S. and Saray the voluntary return forms to sign, but did not verbally explain the documents or inform them of any alternative legal options. S. App. 2, 16, 32.

Laura S. was crying, anguished, and frightened. App. 2, 30-32. She repeated to both CBP agents that Sergio H. was living in Reynosa, that he had threatened to kill her, that he had battered her, and that she had obtained a protective order against him. S. App. 2, 17, 30-31, 65-66.

Speaking at high volume, the two CBP agents ordered Laura S. and Saray to sign the voluntary return documents. S. App. 2, 14-17. Laura S. continued to cry that she would be killed if returned to Mexico. S. App. 17. Instead of referring Laura S. to immigration proceedings based on her clear articulation of fear of returning to Mexico, the CBP agents laughed and mocked her. *Id.* Laura S. twice refused to sign the documents for voluntary removal, saying that it would be an injustice. S. App. 2, 17. The agents indicated firmly with their fingers where the women were to sign and

said that they had to go to Mexico immediately. S. App. 2, 15. Both Laura S. and Saray finally signed the papers. S. App. 17-18.

At dawn, Respondent drove the three friends to the international bridge to Reynosa. S. App. 33. No attorneys' offices were open. S. App. 2. During the brief trip, Laura S. was still anguished, fearful, and pleading not to be sent back. S. App. 33-35. As she got out of the vehicle she said to Respondent, "If I am killed, you will carry that in your conscience." S. App. 19.

Sergio H. found Laura S. soon after she returned to Mexico. S. App. 46-47. He followed and barricaded Laura S.'s vehicle, pulled her out of her car, beat her brutally, and tore at her ear with a bite. *Id.* She escaped but not long afterwards she disappeared. S. App. 47-48. She was found dead, incinerated, in a burned-out car in a remote area. S. App. 35-36, 48. Sergio H. was convicted for her murder. S. App. 49-50.

IV. Procedural History

In 2013, Petitioners brought suit, through their next friend Maria S., in the United States District Court for the Southern District of Texas. They alleged that Respondent had violated their mother's due process rights and that an implied right of action was required in this case under *Bivens*. The government moved to dismiss Petitioners' complaint, arguing in part that a *Bivens* remedy did not extend to her due process claims and that Respondent was entitled to qualified immunity.

On July 15, 2015, the district court found that this case presented a "new context" and that an implied right of action under *Bivens* was available. The district court emphasized that Respondent's "allegedly wrongful actions prevented Laura S. from utilizing the INA's comprehensive remedial scheme" and denied Respondent's motion to dismiss on both *Bivens* and qualified immunity grounds. App. 109-10. The district court also denied Respondent's motion to dismiss on qualified immunity grounds, but sharply limited discovery to "only the facts necessary to rule on [Respondent's] [qualified immunity] defense." App. 126. The court later implored the parties to focus on "the action of [Respondent] at the time [he] met with Laura S. – [his] actual acts concerning her and her response . . . ." App. 85. After the parties engaged in limited discovery, Respondent filed a motion for summary judgment arguing again that he was entitled to qualified immunity.

Disregarding ample eyewitness testimony from fellow passengers who were detained and later processed for voluntary return along with Laura S. about her pleas to remain in the United States, the district court determined that "[d]espite their best efforts, [Petitioners] . . . 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 [Respondent] coerced Laura S." into leaving the United States on June 9, 2009. App. 82-83. The district court granted Respondent's motion for summary judgment.

On appeal, the Fifth Circuit, unprompted by briefing of the parties, revived the *Bivens* discussion and

narrowly defined the context in this case as "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." App. 10. Having found a "new context," the Court of Appeals proceeded to describe a number of special factors that counsel hesitation when extending a *Bivens* remedy, including the existence of a comprehensive remedial scheme under the INA, concern for the separation of powers, and fears that extending an implied right of action would "yield a tidal wave of litigation." App. 12. The Fifth Circuit found that these special factors "preclude [Petitioners'] cause of action." App. 13.

Moving on from the *Bivens* discussion, the Fifth Circuit affirmed the district court's grant of qualified immunity, writing that Laura S.'s clear fear of being returned to Mexico where her abusive ex-boyfriend lived "was an extraneous fact not within the control of [Respondent]." App. 14. Again, the Court of Appeals ignored ample eyewitness testimony and determined that any attempt to ascertain the voluntariness of Laura S.'s signature on administrative voluntary departure forms was "necessarily speculation without her testimony[.]" App. 14-15. The Court of Appeals then proceeded to speculate that perhaps Laura S. was really only signing forms so that she could obtain a "swift, stealthy re-entry into the United States" and ultimately affirmed the district court's grant of qualified immunity because, in its view, Respondent's conduct was "not objectively unreasonable." App. 15.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit departed from well-settled summary judgment standards in this case.

Petitioners do not seek *certiorari* to resolve disputed fact issues. Petitioners seek *certiorari* to ensure that the well-settled summary judgment framework governing how courts must construe disputed facts is applied in this tragic case. The function of the judiciary is "not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Tolan*, 572 U.S. at 656 (citations omitted). It is axiomatic that in a summary judgment analysis, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Id.* at 651 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The lower courts lost sight of these two fundamental precepts when considering Respondent's qualified immunity claim. The courts disregarded evidence of Laura S.'s profound and clearly articulated fear and failed to draw reasonable inferences in her favor based on the circumstantial evidence of coercion presented in this case.

The legal standard for evaluating qualified immunity claims at the summary judgment stage is familiar and well-established. Courts ask, first, whether the facts, "taken in the light most favorable to the party asserting injury," show a violation of a federal right, and, second, whether the right in question was "clearly established" at the time of the violation. *Tolan*, 572 U.S. at 655-56. The "clearly established" standard

requires that the "legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *District of Columbia v. Wesby*, 138 S. Ct. at 590. Courts can dispose of a case using either prong. *Id.* at 656. Here, the lower courts grounded their grant of qualified immunity in the second prong, focusing on whether Laura S.'s rights were "clearly established" or, put differently, whether a reasonable officer would have known that their conduct violated a statutory or constitutional right. App. 13-15, 82-83; *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1850 (2017) ("If it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted, the defendant officer is not entitled to qualified immunity.") (citations omitted).

In evaluating Respondent's claim to qualified immunity at summary judgment, the district court found that Petitioners "created a fact issue as to whether Laura S. told [Respondent] about her fear of returning to Mexico," App. 67, and even wrote that coercion was one of a number of "logical deduction[s]" a juror could draw from the evidence. App. 66. The court's untroubled conclusion that Petitioners raised a fact issue regarding Laura S.'s articulation of fear to Respondent, combined with eyewitness testimony of coercive behavior, and testimony about required actions of CBP agents when confronted with clear articulations of fear, S. App. 73-76, should have naturally led to the determination that a rational factfinder could conclude that Respondent acted unreasonably by failing to refer Laura S. for formal removal proceedings under 8 U.S.C.

§ 1229a, and ordering her signature on voluntary return forms. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (voluntariness of a waiver of rights is to be determined from the "totality of all the circumstances"). In these specific circumstances, Laura S.'s right to apply for relief from removal based on her profound fear was clearly established. *See Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1038 (5th Cir. Unit B 1982) (concluding that "federal regulations establishing an asylum procedure . . . when read in conjunction with the United States' commitment to the resolution of the refugee problem as expressed in the United Nations Protocol Relating to the Status of Refugees . . . , [establish] a clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum."); *see also United States. v. Benitez-Villafuerte*, 186 F.3d 651, 656 (5th Cir. 1999) ("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.'") (quoting *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903)); 8 U.S.C. § 1158(a)(1).

But the district court demanded more from Petitioners and proceeded to boil down the substantial evidence of coercive conditions and behavior to just seven distinct pieces of circumstantial evidence: that Respondent (1) "ordered . . . Laura S. to sign Form I-826," (2) pointed firmly at the form, and (3) told Laura S. she "had to go to Mexico." App. 79. The district court also

"accepted as true" the fact that (4) Laura S. "was under mental strain" and (5) repeatedly refused to sign Form I-826, as well as that (6) Respondent "mock[ed] and laughed at Laura S." and that (7) Laura S.'s friend, who was also processed for a voluntary return on the night in question, testified that she signed Form I-826 because she believed she had "no choice." *Id.* The district court then minimized items 4 through 7 as only providing "context" and not "evidence of coercion." App. 80. All of these factors are pieces of circumstantial evidence from which a juror could reasonably infer coercion. *See Tolan*, 572 U.S. at 657 ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when . . . a court decides only the clearly-established prong of the standard."); *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (choosing from among inferences that "might be permissible" is reversible error). The district court erred by choosing from among reasonable inferences that could be drawn in this case.

Similarly, the Fifth Circuit erred by failing to grapple with the summary judgment issues raised in Petitioners' appeal. First, the Fifth Circuit isolated Laura S.'s fear as "an extraneous fact not within the control of the officers," rather than including it as part of the totality-of-circumstances analysis. App. 14; *see Withrow v. Williams*, 507 U.S. 680, 693 (1993) (emphasizing that "courts look to the totality of the circumstances" to determine voluntariness of a confession, which includes the "mental condition" of the subject as a factor in the calculus). In dismissing Laura S.'s fear

of Sergio H. as "extraneous," the appellate court failed to properly consider competent evidence on Laura S.'s mental state at the time that she was presented with voluntary return forms, or her particular susceptibility to excessive pressure by the officers. *Cf. Davis v. Washington*, 547 U.S. 813, 832-33 (2006) ("This particular type of crime [domestic violence] is notoriously susceptible to intimidation or coercion of the victim[.]").

When considering Petitioners' evidence of Respondent's coercive conduct, the appellate court affirmed the district court's errors by minimizing evidence of coercion. The Fifth Circuit wrote that Respondent merely mocked and laughed at Laura S., pointed firmly at the voluntary return forms, told her in a loud voice to sign the form, and said that she "had to go back to Mexico." App. 15. The Fifth Circuit characterized Respondent's actions as "histrionic," App. 15, rather than considering whether Respondent's actions would allow a reasonable juror to find coercion given the specific facts of this case, including Laura S.'s repeated refusal to sign voluntary return forms and clear articulation of her extreme fear at the prospect of being returned to the city where Sergio H. resided. Moreover, a reasonable juror could infer that Respondent's insistence that she sign voluntary return forms and statement that she "had to go back to Mexico" rendered Laura S.'s "agreement" involuntary, even in light of the options described on the voluntary return forms. Mere failure to advise an individual of the right to refuse consent "increases the coercive nature of the environment." *United States v. Berry*, 670 F.2d 583, 598 (5th

Cir. 1982). Evidence of Respondent's deliberate mischaracterization of Laura S.'s options and orders to sign the voluntary return forms clearly permit a reasonable inference that Respondent acted unreasonably and that his actions had a coercive effect on Laura S.

Further, the Fifth Circuit improperly drew adverse inferences regarding Laura S.'s potential motives for signing Form I-826. The court stated that in the absence of testimony from Laura S., following her brutal murder, any evidence of her motives was "*necessarily* speculation." App. 14-15 (emphasis added). The court stated that Laura S. may have had several reasons for signing Form I-826, including "a swift departure over the border followed by a swift, stealthy reentry into the United States." But this ignores considerable circumstantial evidence of Laura S.'s mental state when signing Form I-826 and the reasonable inferences a factfinder could make in light of the circumstantial evidence. "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944).

The weighing of evidence and "drawing of legitimate inferences from the facts" have long been functions reserved for the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The lower courts departed from well-settled summary judgment standards when reviewing the summary judgment record in this case. Petitioners seek *certiorari* to ensure that the proper summary judgment framework is applied.

II. The Fifth Circuit misinterpreted and misapplied *Ziglar v. Abbasi*.

The Fifth Circuit *sua sponte* revived the question of whether to extend a *Bivens* remedy in light of this Court's ruling in *Abbasi*. App. 8-13. The district court decided that issue in favor of Petitioners on July 15, 2015, prior to this Court's opinion in *Abbasi* and before the district court's separate and erroneous summary judgment order, dated July 21, 2017. App. 102-120.

The *Bivens* question is "antecedent" to questions of qualified immunity. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017). If the Fifth Circuit wished to take up the *Bivens* issue, it should have followed this Court's guidance and remanded the case to the district court for consideration of this question in the first instance. *See Hernandez*, 137 S. Ct. at 2006-07; *Abbasi*, 137 S. Ct. at 1865. Instead, the Fifth Circuit decided that "[t]he district court erred as a matter of law" on the issue of whether, in light of *Abbasi*, a *Bivens* remedy should extend in this case, all while acknowledging that the parties and the district court "lacked the guidance of the Supreme Court's recent elucidation of *Bivens* in [*Abbasi*]." App. 9.

In its rush to reach the *Bivens* question, the Fifth Circuit made critical errors in its analysis: first, it failed to adequately consider whether there is any meaningful distinction between this case and the original *Bivens* action, and second, it failed to engage in the appropriate level of factual specificity when analyzing

whether any "special factors" counsel hesitation in extending a *Bivens* remedy.

In *Abbasi*, this Court emphasized the vital and necessary role that *Bivens* maintains in the "common and recurrent sphere of law enforcement" and the "powerful reasons to retain it in that sphere." *Abbasi*, 137 S. Ct. at 1856-57. The primary purpose of an implied cause of action under *Bivens* is the deterrence of unlawful conduct by government officials. *F.D.I.C. v. Meyer*, 510 U.S. 471, 485 (1980) ("It must be remembered that the purpose of *Bivens* is to deter the *officer*."). This Court has made clear that the existing scope of *Bivens* should not be narrowed, otherwise the deterrent effect of the doctrine will be lost. *Id.* (guarding against "the evisceration of the *Bivens* remedy" so that its "deterrent effects . . . would [not] be lost"). By refusing to recognize a *Bivens* remedy in this case, the Fifth Circuit inappropriately narrowed *Bivens* to its facts and stripped the doctrine of its intended deterrent effect. *Certiorari* is therefore warranted to correct a decision that "conflicts with relevant decisions of this Court" and to clarify the contexts in which an implied right of action is available under *Bivens*, particularly in situations where a plaintiff has no resort to an alternative remedial scheme. SUP. CT. R. 10(c).

a. The Fifth Circuit erred in determining that this case presents a "new context."

In *Abbasi*, this Court provided lower courts with the tools for evaluating whether a case differs in a

"meaningful way" and therefore presents a "new context" for the purposes of implying a *Bivens* remedy. *Abbasi*, 137 S. Ct. at 1860. The Court wrote:

> A case might differ in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the official action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or [7] the presence of potential special factors that previous *Bivens* cases did not consider.

Id. The Court went on to describe that *Abbasi* presented a new context in part because the plaintiffs brought suit challenging "high-level executive policy created in the wake of a major terrorist attack on American soil." *Abbasi*, 137 S. Ct. at 1860. This case presents none of the concerns associated with challenges to executive policy and, like *Bivens*, involves rank-and-file law enforcement officers, claims against unlawful overreach, and significant judicial and regulatory guidance regarding the conduct at issue in the case. Also like in *Bivens*, for Petitioners "it is damages or nothing." *Bivens*, 403 U.S. at 410.

The Fifth Circuit did not discuss or even identify the factors set out by this Court in *Abbasi*. Rather than engage in an analysis of how this case differs in a

"meaningful way" from *Bivens*, *Davis v. Passman*, 442 U.S. 228 (1979), or *Carlson v. Green*, 446 U.S. 14 (1980), the Fifth Circuit, in two sentences, narrowly defined this case as factually different from previous *Bivens* actions and concluded that it presents a "new context." App. 10 ("Neither the Supreme Court nor [the Fifth Circuit] 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."). The Fifth Circuit's scant treatment of this factor does not respond to *Abbasi*'s requirement of *meaningful* differences and ignores the Fifth Circuit's own settled law regarding *Bivens* claims against rogue immigration officers. *See Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (allowing a *Bivens* claim against a single incident of law enforcement overreach by a Border Patrol agent).

Moreover, the Fifth Circuit's conclusion that a new context is present in this case improperly narrows *Bivens* to its exact factual circumstances in disregard of this Court's guidance that *Bivens* continue to play a vital role in the law enforcement sphere and its acknowledgment that "[s]ome differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context." *Abbasi*, 137 S. Ct. at 1865. The Fifth Circuit's narrow characterization of Petitioners' claim and review of whether that exact same claim has been previously recognized as a proper *Bivens* candidate is clearly inconsistent with this Court's guidance that *Bivens* should remain a "fixed *principle* of law," rather

than a remedy the availability of which turns on whether a court can draw insignificant factual distinctions. *Abbasi*, 137 S. Ct. at 1857 (emphasis added).

b. "Special factors" do not counsel hesitation in extending a *Bivens* remedy in this case.

The special factors analysis is performed on a case-by-case basis at a high level of factual specificity. *See Rodriguez v. Swartz*, 899 F.3d 719, 744 (9th Cir. 2018) (focusing the analysis on "concrete facts and circumstances," not "the abstract level"); *see also Wilkie v. Robbins*, 551 U.S. 537, 555-62 (2007) (eschewing "more abstract concepts of liability for retaliatory or undue pressure" on plaintiff in favor of scrutinizing series of discrete "coercive acts" alleged). Considered broadly, any case seeking a judicially imposed remedy implicates separation of powers concerns, and yet *Bivens* remains the law, particularly in the "common and recurrent sphere of law enforcement," *Abbasi*, 137 S. Ct. at 1856, and particularly where it is "damages or nothing." *Bivens*, 403 U.S. at 410. Failure or refusal to closely consider the facts of each case would swallow the *Bivens* doctrine entirely. The Fifth Circuit's analysis fails to engage in the factual specificity necessary to determine whether special factors actually counsel hesitation in this case, as opposed to cases involving "civil immigration enforcement" more broadly. App. 11 (quoting *De La Paz v. Coy*, 786 F.3d 367, 377 (5th Cir. 2015)).

i. The INA was not available to Petitioners.

The Fifth Circuit identified the "comprehensive administrative and remedial procedures of the [INA]" as the lead special factor counselling hesitation when extending a *Bivens* remedy to Petitioners. App. 11. In doing so, it plainly sidestepped the allegations of Laura S.'s children – two of whom are U.S. citizens categorically excluded from the INA's procedures. *See* App. 119 ("It is nonsensical to conclude that, because [their mother's] fears were actualized . . . the estate of Laura S. and her children are therefore without a remedy."). Petitioners allege that Respondent coerced their mother into relinquishing access to the INA's remedial procedures. Of course it is true that, had Respondent not coerced Laura S. into relinquishing her right to plead her case before an immigration judge, she would have been able to include constitutional arguments as part of her case. But Petitioners assert that Respondent intentionally deprived their mother of this and other protections of the INA, despite the fact that she twice refused Respondent's demand and insisted upon her fear of returning to Mexico. This requires a judicially created remedy to safeguard the procedures established by Congress. *See, e.g.*, *Rauccio v. Frank*, 750 F. Supp. 566, 571 (D. Conn. 1990) (permitting *Bivens* remedy where plaintiff's due process claim was premised on defendant's "interference with the procedural mechanism which Congress has created" to safeguard rights); *cf. De La Paz v. Coy*, 786 F.3d 367, 379 (5th Cir. 2015) (stating that immigrant detainees' "ultimate

remedies lie in pursuing termination of removal proceedings"). In this instance, damages are the only possible legal remedy for constitutional violations by a rogue federal law enforcement officer. There was no way for Laura S. to access any other form of statutory relief or protection. *Bivens* and *Abbasi* stress the importance of preserving a judicially created remedy in these situations. *Bivens*, 403 U.S. at 395 ("In such cases there is no safety for the citizen, except in the protection of the judicial tribunals[.]") (internal quotation marks omitted); *Abbasi*, 137 S. Ct. at 1862 ("[I]ndividual instances of . . . law enforcement overreach . . . are difficult to address except by way of damages actions after the fact."). Congress may well have sought to avoid certain damages cases by requiring, in many instances, that claims of constitutional violations be raised and remedied within the immigration case itself and on appeal. Yet Congress has not precluded *Bivens* and clearly did not intend for the entire INA to be cast aside by low-level officials with full impunity.

ii. The specific facts of this case do not raise separation of powers concerns sufficient to deny Petitioners a *Bivens* remedy.

In a similar vein, the Fifth Circuit declined to extend a *Bivens* remedy to prevent "judicial meddling in immigration matters" and attendant separation of powers concerns. App. 11. Again the Fifth Circuit failed to analyze this case with the requisite level of factual specificity. The Fifth Circuit itself previously rejected a

broad swipe at all *Bivens* claims involving immigration issues. *See Hernandez v. United States*, 757 F.3d 249, 275 (5th Cir. 2014) (declining to follow a categorical rejection of immigration cases for *Bivens* consideration "because the opinion unjustifiably extends the special factors identified in *Arar* well beyond that decision's specific national security 'context of extraordinary rendition'" (citing *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009)). Although the political branches have broad powers and a substantial interest in speaking "with one voice" on the exclusion and removability of foreign nationals, *Arizona v. United States*, 567 U.S. 387, 409 (2012), this Court has recognized that protective measures may be warranted for "[p]erceived mistreatment" at the hands of those who enforce federal immigration law. *Id.* at 395; *see also, e.g.*, *Martinez-Aguero v. Gonzalez*, 459 F.3d at 627 ("[W]e cannot conceive of any national interests that would justify [the use of excessive force] simply because that person is an excludable alien[.]") (internal quotation marks omitted). This case does not present the same considerations that were present in *Abbasi*. That case dealt with a high-level executive policy formulated in the wake of the September 11, 2001, terrorist attack, and challenged the conditions of confinement of individuals designated by the FBI to be detained under a "hold-until-cleared policy" based on the agency's investigation into the attacks. *Abbasi*, 137 S. Ct. at 1860-63. Further, in that case respondents sought accountability for a large-scale policy decision concerning the detention of hundreds of individuals, which would necessitate an inquiry into sensitive national security matters regarding counterterrorism

operations. *Id.* Here, by contrast, the individualized claim of violations by a rogue officer in a particular instance more closely hew to the "sphere of law enforcement" that remains the core of *Bivens* remedies. *Id.* at 1857; *see also De La Paz*, 786 F.3d at 379 (acknowledging that it would be "unusual" for *Bivens* suits concerning immigration enforcement to involve "more than normal domestic law-enforcement priorities and techniques") (internal quotation marks omitted).

iii. Extension of a *Bivens* remedy in this extreme case will not yield a "tidal wave of litigation."

Petitioners' claim that they are entitled to a *Bivens* remedy does not imply that all who are subjected to voluntary return procedures should have the same cause of action. Again, the Fifth Circuit departed from this Court's guidance regarding the level of factual specificity required at the "special factors" stage. *See, e.g., Abbasi*, 137 S. Ct. at 1860-63. This is a rare case that is easily distinguishable from the run-of-the-mill voluntary return process because of Laura S.'s tragic death and the fact that her surviving children bring suit. This is not the typical "immigration" case, where imposing personal liability might deter agents from vigorous enforcement and "force CBP to . . . adopt excessive precautions to prevent potential liability." App. 12. Nor is it one in which extending a *Bivens* remedy would "cripple immigration enforcement" or "expose[] enforcement officers to personal liability simply for doing their job." *De La Paz*, 786 F.3d at 380. To the extent

that allowing a *Bivens* remedy in this case would require agents to refrain from coercing unlawful voluntary returns, such a duty is already incumbent on them and would add no further burden. *See* App. 117 ("[T]he 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."). As explained above, for more than thirty years significant litigation has been brought on behalf of individuals subject to voluntary return. This case presents no greater risk of additional lawsuits. To the extent a judicially implied cause of action in this extreme case might expose officers to litigation, that risk is more than counterbalanced by the strong national interest in treating non-citizens humanely. *See Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) (describing substantial interests in treating undocumented individuals humanely).

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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