No. 18-1350

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., PETITIONER

v.

RAMIRO GARZA

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that respondent was entitled to qualified immunity based on the summary-judgment record in this case.

2. Whether the court of appeals correctly declined to extend the damages remedy recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to a claim involving an alien's death in another country following an alleged deprivation of procedural due process during the alien's removal from the United States.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

Maria S., as Next Friend for E.H.F., S.H.F., and A.S.G., Minors v. *Ramiro Garza, et al.*, 1:13-CV-108 (July 15, 2015) (order denying motion to dismiss)

Maria S., As next friend for E.H.F., S.H.F., and A.S.G., minors v. *John Doe, et al.*, 1:13-CV-108 (July 21, 2017)

United States Court of Appeals (5th Cir.):

Maria S., as Next Friend for E.H.F. S.H.F. and A.S.G., Minors v. *Ramiro Garza; Ruben Garcia*, No. 17-40873 (Jan. 4, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 912 F.3d 778. The opinion of the district court granting summary judgment (Pet. App. 16-83) is reported at 267 F. Supp. 3d 923. The opinion of the district court denying a motion to dismiss (Pet. App. 88-126) is not published in the Federal Supplement but is available at 2015 WL 4394745.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2019. The petition for a writ of certiorari was filed on April 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is unlawfully

present in the United States following entry without inspection is treated as an applicant for admission. 8 U.S.C. 1225(a)(1). The alien is subject to removal proceedings but may be permitted to depart voluntarily in lieu of such proceedings. 8 U.S.C. 1229c(a)(1); see 8 U.S.C. 1225(a)(4) ("An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States."). The practice of departing voluntarily in lieu of removal proceedings is commonly called "voluntary return." Pet. App. 5 n.2; see, *e.g.*, *Rosario-Mijangos* v. *Holder*, 717 F.3d 269, 279 (2d Cir. 2013) (explaining that an alien admits unlawful status, waives the right to appear before an immigration judge, and elects to return home). Voluntary return is distinct from "voluntary departure," which ordinarily refers to departure after removal proceedings have concluded, or at least after they have commenced. Pet. App. 22-23 n.5.

U.S. Customs and Border Protection (CBP) implements the "voluntary return" practice through its Form I-826. Pet. App. 4-5, 22-24. That form includes a "Notice of Rights" section, which explains that an unlawfully present alien has the right to a hearing in immigration court, a right to consult an attorney or legal representative, and a right to communicate with consular or diplomatic officials. *Id.* at 4. The notice also explains that, "[i]n the alternative, you may request to return to your country as soon as possible, without a hearing." *Ibid.* Below the "Notice of Rights" section, the form includes a "Request for Disposition" section, which offers the alien a menu of three options:

(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."

Id. at 4-5. The alien must check the box for one option, place his or her initials next to the selected option, and sign the form. *Id.* at 5.

Although an alien has the right to contest removal in a hearing before an immigration judge (*i.e.*, the first or second option), choosing voluntary return (*i.e.*, the third option) offers several benefits. Most notably, voluntary return is quick and easy. As with voluntary departure, the alien "avoids extended detention pending completion of travel arrangements; is allowed to choose when to depart (subject to certain constraints); and can select the country of destination." *Dada* v. *Mukasey*, 554 U.S. 1, 11 (2008). With voluntary return, the alien does not have to wait in detention for a hearing, see Pet. App. 24, and—unlike voluntary departure granted following the initiation of removal proceedings, see 8 U.S.C. 1229c(c)—may be able to choose voluntary return again in the future. Moreover, the alien avoids the risks of contesting removal, including the possibility that she will become subject to an order of removal, which would render her

inadmissible for at least five years. See 8 U.S.C. 1182(a)(9).

2. In the early morning of June 8, 2009, petitioner's daughter, Laura S., was driving a car near Pharr, Texas, when she was stopped by a local police officer for a traffic violation. Pet. App. 2. During the stop, the officer asked Laura and her three passengers for proof of citizenship or immigration status. *Ibid.* One of the passengers had authorization, but Laura and two other passengers, Arturo Morales and Saray Cardiel, did not. *Ibid.*; see *id.* at 21 & n.4. When the police officer notified CBP, Laura allegedly began to cry and told the officer that Sergio H., her ex-boyfriend and her children's father, would hurt her if she returned to Mexico. *Id.* at 2, 21. Sergio had previously abused Laura and had threatened to kill her, and Laura had once obtained a protective order against him (which had since expired). *Id.* at 2-3. Sergio had returned to Mexico and was allegedly working for a drug cartel. *Id.* at 3.

A CBP agent, respondent Ramiro Garza, took custody of Laura, Morales, and Cardiel. Pet. App. 3. Agent Garza drove the three to a CBP processing center in Weslaco, Texas; on the drive, Laura allegedly cried and told Agent Garza that she feared Sergio. *Ibid.* At the center, Laura and Cardiel were processed together. *Ibid.* Agent Garza and another agent fingerprinted and interviewed them. *Ibid.* The agents did not threaten Laura or Cardiel and did not restrain or handcuff them. *Ibid.* Agent Garza removed his handgun before entering the interview room, although he retained his taser and baton. *Ibid.* During the interview, Laura allegedly told the agents about Sergio's physical abuse and said that she had a protective order against him, but the

agents allegedly ignored her comments and "in high volume voices" told Laura and Cardiel that they had to return to Mexico. *Id.* at 3-4.

The agents gave Laura a Form I-826, translated into her native language, Spanish. Pet. App. 4; see *id.* at 26. As described above, the form explained that she had a right to a hearing in immigration court or, in the alternative, that she could request to return to her country as soon as possible. *Id.* at 4. It also offered her three options: (1) to request a hearing before the immigration court about whether she could remain in the United States; (2) to request a hearing because she believed that she may face harm if returned to her country; or (3) to admit that she was illegally in the United States and did not face harm if returned and to give up the right to a hearing before the immigration court. *Id.* at 5. Before this incident, Laura had twice been apprehended, in 2002 and 2005, and had completed nearly identical Form I-826s, choosing voluntary return both times. *Id.* at 27. This time, Laura allegedly refused to complete the form. *Ibid.* After officers allegedly told her that she had to sign, Laura drew an "X" in the check-box beside the voluntary-return option and initialed the line next to her selection. *Ibid.*; see *id.* at 26. She signed and dated the bottom of the form. *Id.* at 26. The entire process lasted between 20 and 30 minutes. *Id.* at 14.

Cardiel also chose the voluntary-return option. Pet. App. 5. She later testified that she chose that option because she did not want to be detained for a long time before a hearing and because she felt that she had no other choice. *Ibid.* Cardiel further testified that she did not worry that Agent Garza would hurt her, but rather that she "was worried that Agent Garza would detain

her for a long period of time." *Id.* at 74-75. She accordingly selected voluntary return and signed the form "because it was the fastest way to be released from custody." *Id.* at 77.

After processing Laura, Cardiel, and Morales for voluntary return, Agent Garza drove them to a bridge to Mexico. Pet. App. 6. Laura allegedly told him again during this trip that she feared returning to Mexico. *Ibid.* Laura crossed the bridge and went to her grandmother's house in Mexico. *Ibid.* A short time later, Sergio murdered Laura. *Ibid.*

3. Petitioner brought this action as next friend of Laura's children, seeking damages from Agent Garza and another CBP agent, Ruben Garcia, in their individual capacities under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 7.[1] The complaint alleged that the agents had coerced Laura into selecting voluntary return on the Form I-826, in violation of her procedural-due-process rights. *Ibid.*

a. The agents moved to dismiss, and the district court denied the motion. Pet. App. 88-126. As relevant here, the court extended the damages remedy recognized in *Bivens* to petitioner's claims. *Id.* at 102-120. The court recognized that this case presents a "new context": a "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." *Id.* at 103,

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[1] Agent Garcia was the supervisor at the Weslaco processing center. Pet. App. 6. The petition refers to him only as "another CBP agent," Pet. 9, and does not list him as a respondent, Pet. ii. Petitioner thus does not appear to challenge the dismissal of her claim against Agent Garcia.

106. But it determined that a *Bivens* remedy should apply in that new context, as it believed that no "special factors counsel[ed] hesitation in the absence of affirmative action by Congress." *Id.* at 106 (quoting *Bivens*, 403 U.S. at 396); see *id.* at 106-120. The court also rejected, at that stage, the agents' qualified-immunity defense, instead issuing "a narrowly tailored discovery order aimed at uncovering only the facts necessary to rule on [that] defense." *Id.* at 126.

b. Following limited discovery, the agents moved for summary judgment, and the district court granted summary judgment on qualified-immunity grounds. Pet. App. 16-83.

With respect to Agent Garza, the district court concluded that the evidence demonstrated that Laura had knowingly and voluntarily selected voluntary return on the Form I-826. Pet. App. 55-82.[2] The court first determined that Laura had knowingly selected voluntary return. *Id.* at 55-61. It noted that the Form I-826 clearly explained, in her native language, Laura's rights and options. *Id.* at 56. The court also observed that Laura had previous experience with the Form I-826, having been presented with the form twice before and both times having selected the option for voluntary return to Mexico. *Id.* at 57-68. In sum, the court explained, "[t]he 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." *Id.* at 59.

The district court next determined that Laura's choice of the voluntary-return option—waiving her

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[2] With respect to Agent Garcia, the district court concluded that he was entitled to judgment both on the merits and on qualified immunity because no evidence directly linked him to any violation of Laura's constitutional rights. Pet. App. 29-34.

right to a hearing before an immigration judge—was voluntary. Pet. App. 61-82. The court explained that the voluntariness of a waiver depends on the "totality of the circumstances." *Id.* at 62. It then listed a dozen pieces of evidence that petitioner had identified that purported to raise a factual dispute about voluntariness, including Laura's initial refusal to sign the form and Agent Garza's speaking in a loud voice. *Id.* at 65. But the court explained that most of petitioner's case "essentially boil[ed] down to" the argument that, given Laura's fear of returning to Mexico, she would not have voluntarily signed the Form I-826 "*unless* she was coerced"—an argument that, though "not illogical," is "not evidence." *Id.* at 66. The court noted that petitioner did not introduce evidence that Laura's physical or mental condition made her susceptible to coercion; that the length or manner of the detention was coercive; or that Laura was subject to coercive time pressure. *Id.* at 67-78. The court concluded that the few available "threads of circumstantial evidence," even "when woven together," were insufficient to create a genuine issue of material fact about whether Agent Garza coerced Laura into selecting voluntary return. *Id.* at 79.

4. The court of appeals affirmed. Pet. App. 1-15. It concluded that the agents were entitled to judgment "[f]or two independent reasons": "(1) 'special factors' preclude the extension of a *Bivens* remedy to this 'new context' and (2) the defendants were entitled to qualified immunity." *Id.* at 2.

Although the parties did not brief the issue on appeal, the court of appeals first held that, under *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), a *Bivens* remedy should

not be extended to petitioner's claim. Pet. App. 8-13.[3] The court began by noting that "[t]here is no question that this case involves a 'new context'" under *Abbasi*. *Id.* at 10. It then reasoned that several special factors counseled against extending a *Bivens* remedy to this new context. *Id.* at 10-13. First, the court explained that, "[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.* at 11 (quoting *De La Paz* v. *Coy*, 786 F.3d 367, 377 (5th Cir. 2015)) (brackets in original). Second, it cautioned against "judicial meddling in immigration matters" because the Constitution assigns broad authority over immigration to the political branches. *Id.* at 11-12. Third, the court observed that, given the frequency with which aliens choose voluntary return, allowing those aliens to assert procedural-due-process claims for damages could result in a "tidal wave of litigation" against immigration officers. *Id.* at 12 (citation omitted).

The court of appeals recognized that its *Bivens* holding "disposes of this case," but it also held in the alternative that Agent Garza was entitled to qualified immunity. Pet. App. 13-15. The court explained that

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[3] The district court issued its order permitting petitioner's *Bivens* action to proceed before this Court decided *Abbasi*. See Pet. App. 88. The agents' court of appeals brief accordingly noted that *Abbasi* had "dramatically limited the availability of the *Bivens* remedy in a manner that undermines the district court's decision." Resp. C.A. Br. 11 n.4. The brief further noted that, although the agents "do not raise the *Abbasi* decision as an alternative ground for affirmance here, because this case can be affirmed more directly on the basis of the decision below, we believe that *Abbasi* bars a *Bivens* action in these circumstances, and we intend to bring the decision to the attention of the district court if this case is remanded." *Ibid.*

"[t]he 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." *Id.* at 14. In particular, the court observed that Laura had been detained at a "standard immigration detention facility" for only about 20 to 30 minutes; no officer had brandished a firearm or weapon; Laura had not been handcuffed; Laura was familiar with the procedures, based on two prior incidents where she had voluntarily returned to Mexico; and the Form I-826 had been provided to her in Spanish and clearly offered her a choice to voluntarily return or to pursue formal immigration proceedings. *Ibid.* The court thus determined that, even assuming that Agent Garza had "'mock[ed]' and laughed at Laura S.; pointed 'firmly' at the [Form I-826] 'in a strong manner;' told her in a loud voice to sign the form; and said she 'had to go back to Mexico,'" that would not, "without more," raise a genuine issue of material fact about coercion. *Id.* at 15 (brackets in original). The court added that Laura's fear of Sergio could not bolster that evidence, as her fear of someone else was "not within the control of the officers." *Id.* at 14.

ARGUMENT

Petitioner contends (Pet. 13-28) that the court of appeals erred in affirming the district court's grant of qualified immunity to Agent Garza and in declining to extend the damages remedy recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted. In addition, because this case requires a different *Bivens* analysis and because the court

of appeals adopted alternative independent grounds for affirmance, it would not be appropriate to hold this case for *Hernández* v. *Mesa*, cert. granted, No. 17-1678 (oral argument scheduled for Nov. 12, 2019).

1. Petitioner first contends (Pet. 13-18) that, in affirming the district court's qualified-immunity ruling, the court of appeals failed to properly apply "the well-settled summary judgment framework," Pet. 13, to the facts of this case. Petitioner does not assert (*ibid.*) that the court adopted any improper legal test but rather that it "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" in this particular case. That highly fact-specific contention does not warrant this Court's review. See Sup. Ct. R. 10.

In any event, the court of appeals correctly concluded that Agent Garza was entitled to qualified immunity on petitioner's claim that he coerced Laura's decision to voluntarily return to Mexico. In the criminal context, the test for voluntariness asks whether government agents have produced a guilty plea "by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Brady* v. *United States*, 397 U.S. 742, 750 (1970). The court did not consider whether a different standard might apply to the voluntariness of an alien's decision to waive removal proceedings and return to her country. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 243 (1973) ("[U]nlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonably presumption ought to be indulged against voluntary relinquishment."); see also *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002) ("Removal hearings are civil

proceedings, not criminal; therefore, procedural protections accorded an alien in a removal proceeding are less stringent than those available to a criminal defendant."), cert. denied, 537 U.S. 1135 (2003).[4] But even under the criminal standard, the court properly determined that petitioner did not introduce sufficient evidence that Agent Garza overbore Laura's will, and that such coercion would have been clear to any reasonable officer. Pet. App. 14. As the district court's lengthy and "exceptionally thorough review of the relevant facts" made clear, this interaction involved a brief detention in an ordinary immigration facility, without any physical restraints or threats, of an alien advised of her rights in her native language and familiar with the voluntary-return process. *Ibid.*

Petitioner primarily asserts (Pet. 14-17) that both lower courts failed to give sufficient weight to the disputed issue of fact whether Laura told Agent Garza that she feared returning to Mexico. But even accepting petitioner's allegations that Laura informed Agent Garza of her fear, that demonstrates only that Laura could have applied for relief from removal in formal proceedings under 8 U.S.C. 1229a. And the one-page Form I-826 that Laura completed and signed—for the third time—made her entitlement to that process clear in her native language. See Pet. App. 26. Because Laura's options were presented to her clearly and without the sort of physical or mental pressure that might overbear someone's will, any alleged communications about Laura's fear do not provide evidence that Agent Garza coerced her into forgoing her rights. See *id.* at 67-78.

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[4] Indeed, the court of appeals declined to decide whether petitioner had asserted any clearly established procedural-due-process right. See Pet. App. 13-14.

Petitioner also raises several related arguments. First, she suggests (Pet. 15, 17) that Agent Garza coerced Laura into signing the Form I-826. But the relevant question is not whether Laura was coerced to *complete the form* but rather whether she was coerced to *select voluntary return* on the form. Pet. App. 64. Second, petitioner highlights (Pet. 15, 17) her allegation that Agent Garza told Laura that she had to return to Mexico. But because Laura was unlawfully present in the United States, that generic statement could have been true under any of the three options presented on the Form I-826, and it did not sufficiently "muddle the rights spelled out" on the form. Pet. App. 59. Third, petitioner contends (Pet. 17-18) that, in light of Laura's troubled "mental state," she was susceptible to coercion. But the district court carefully considered allegations related to her mental state, and it explained in detail that Agent Garza neither created nor stoked Laura's fears of violence by Sergio. Pet. App. 67-68.

At bottom, petitioner appears to rely (Pet. 18) on the assumption that Laura would not have selected voluntary return to Mexico unless coerced to do so. But the court of appeals correctly described that assumption as "speculation" and found such speculation insufficient to create a genuine issue of material fact and overcome qualified immunity. Pet. App. 14. And it is not difficult to speculate other reasons why Laura might have selected the voluntary-return option. In particular, had she chosen the option of a hearing, Laura likely would have remained in detention, as the Form I-826 warned: "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." *Id.* at 4, 23; see *id.* at 74. That possibility of detention is why Laura's friend Cardiel—who

was processed alongside Laura—likewise selected voluntary return. See *id.* at 77. Moreover, Laura had twice before selected voluntary return and had returned to the United States thereafter, so she was familiar with the process and may have had a clear sense of its benefits. See *id.* at 14; see also pp. 3-4, *supra*.

2. Petitioner also contends (Pet. 19-28) that the court of appeals erred in holding, in the alternative, that she lacks a damages remedy under *Bivens* based on her claim against CBP agents for a procedural-due-process violation that occurred during an alien's removal from the United States and allegedly led to the death of that alien abroad at the hands of another alien. The court correctly followed this Court's decision in *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), in declining to extend *Bivens* to that new context, and petitioner fails to identify any other court that has recognized a similar *Bivens* claim.

a. The court of appeals first correctly concluded that this case presents a "new context" under *Abbasi*. 137 S. Ct. at 1859; see Pet. App. 20-23. *Abbasi* makes clear that a context is new if "the case is different in a meaningful way from previous *Bivens* cases decided by this Court." 137 S. Ct. at 1859. And as the Court's nonexhaustive list of differences illustrates, the degree of difference may be small and yet "meaningful." *Id.* at 1860. Multiple meaningful differences exist here. As an initial matter, this Court has not previously extended a *Bivens* remedy to the procedural-due-process component of the Fifth Amendment. See *id.* at 1859-1860 (noting that "differences that are meaningful enough to make a given context a new one" include differences in "the constitutional right at issue"). Indeed, this Court has twice rejected a *Bivens* remedy arising from an asserted violation of procedural due process. See *FDIC* v.

Meyer, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988). In addition, the claim here relates to immigration rather than domestic law enforcement, and it rests on an injury to an alien that occurred abroad at the hands of another alien. Given the new constitutional right at issue and the other novel circumstances, the court of appeals appropriately determined that "[t]here is no question that this case involves a 'new context.'" Pet. App. 10.

b. The court of appeals also correctly concluded that at least three "special factors counsel[ed] hesitation" about extending a damages remedy to this new context "in the absence of affirmative action by Congress." *Abbasi*, 137 S. Ct. at 1857 (citation omitted); see Pet. App. 23-28.

First, "[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." Pet. App. 11 (citation omitted; brackets in original). That "institutional silence," *ibid.*, indicates that Congress's omission of the damages remedy that petitioner seeks was not a "mere oversight," *Abbasi*, 137 S. Ct. at 1862; see *ibid.* (explaining that, given Congress's "'frequent and intense'" attention to a subject, its "silence [about a damages remedy] is telling") (citation omitted). Although petitioner contends (Pet. 24-25) that the INA's remedial scheme was not available to Laura here, that contention relates to whether petitioner has adequate alternative remedies —a separate basis for declining to extend *Bivens*. See *Schweiker*, 487 U.S. at 421-422. It does not undermine the fact that Congress has extensively legislated in the immigration sphere, and the judiciary should exercise

great caution before creating new causes of action in that sphere.

Second, the immigration context presents particular separation-of-powers concerns. "[T]he Constitution gives the political branches 'broad, undoubted power over the subject of immigration,'" yet petitioner's theory here could enmesh the courts in immigration policy and removability decisions. Pet. App. 11-12 (quoting *Arizona* v. *United States*, 567 U.S. 387, 394 (2012)). Petitioner asserts (Pet. 25-27) that extending a *Bivens* claim to cover procedural-due-process violations by individual CBP officers will not implicate federal immigration policy. But even the limited discovery granted in this case demonstrates why that is not necessarily true. See, *e.g.*, Pet. App. 85-86 (compelling the production of information about CBP policies, procedures, and interviewing techniques). Moreover, to the extent a plaintiff alleges that, but for a procedural-due-process violation, the plaintiff would have been allowed to remain in this country and would have avoided harm abroad, courts evaluating that sort of causal chain will be forced to decide questions of removability and other issues of federal immigration law in the *Bivens* context.

Third, extending a *Bivens* remedy to this context could "yield a tidal wave of litigation." Pet. App. 12 (citation omitted). As the court of appeals noted, one CBP supervisor estimated that approximately 95% of aliens processed at the Weslaco center at that time selected voluntary return, and any number of them might sue for hardships that they subsequently endured upon returning to their native countries. *Ibid.* Particularly because, on petitioner's theory, a coercion claim often would present a "he-said-she-said scenario," such claims would be "difficult to dismiss on summary judgment and costly to

litigate." *Ibid.* Compounding those concerns, if the actual harm for which such plaintiffs seek damages occurs in a foreign country, difficult causation questions and further evidentiary complications would arise. This Court has suggested that those sorts of systemic concerns counsel against the expansion of a *Bivens* remedy. See, *e.g.*, *Wilkie* v. *Robbins*, 551 U.S. 537, 554 (2007) (explaining the need to "weigh[] reasons for and against the creation of a new cause of action, the way common law judges have always done"). And although petitioner asserts (Pet. 28) that this case is "extreme" and will not greatly increase the "risk of additional lawsuits," the tragic facts of this case do not limit its potential to generate other litigation.

More generally, petitioner faults (Pet. 23) the court of appeals' special-factors analysis for "fail[ing] to engage in the factual specificity necessary to determine whether special factors actually counsel hesitation in this case." But this Court has previously explained that the special-factors analysis applies to a *class* of claims. See, *e.g.*, *United States* v. *Stanley*, 483 U.S. 669, 681 (1987) (declining to assess whether special factors would counsel hesitation "in the particular case"). Indeed, the Court has cautioned that requiring case-by-case determinations about the applicability of various special factors could further enmesh the judiciary in sensitive questions that implicate the separation of powers. See *id.* at 682 (noting that "[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters"). *Abbasi* confirmed that the question whether to imply a damages remedy is not limited to the facts of one particular case but rather

turns on the impact of a class of damages claims "on governmental operations systemwide." 137 S. Ct. at 1858; see, *e.g.*, *id.* at 1857 (listing classes of *Bivens* claims that the Court has previously rejected).

c. In any event, this case would be an unsuitable vehicle for addressing the court of appeals' *Bivens* holding for two reasons. First, the court's decision not to extend a *Bivens* remedy to the new context here is one of two alternative holdings. See Pet. App. 2, 13. As explained above, further review is not warranted on the court's factbound qualified-immunity holding. See pp. 11-14, *supra*. And a conclusion that the court erred on only one of two independent grounds for its decision would still require affirmance.

Second, although the court of appeals reached the correct outcome, the court addressed the *Bivens* question without briefing from the parties. See Pet. App. 9; see also Resp. C.A. Br. 11 n.4. It also declined to hold oral argument. If this Court were interested in the *Bivens* question, it should await a case in which the issue was fully briefed and argued by the parties.

3. This Court recently granted a petition for a writ of certiorari raising the question whether a *Bivens* remedy should be extended to Fourth and Fifth Amendment claims arising from a cross-border shooting that resulted in an injury to a foreign citizen in a foreign country. See *Hernández*, *supra* (No. 17-1678). This case need not be held pending a decision in *Hernández*. Because this case involves a different constitutional right (the procedural-due-process component of the Fifth Amendment) and a different context (including the immigration system, the alleged violation of the rights of an alien present in the United States, and an

injury inflicted by one foreign citizen on another in another country), it requires a different special-factors analysis from the one that this Court may perform in *Hernández*. Compare *Hernandez* v. *Mesa*, 885 F.3d 811, 819-823 (5th Cir. 2018) (en banc), cert. granted, No. 17-1678 (oral argument scheduled for Nov. 12, 2019), with Pet. App. 10-12.

Moreover, even if this Court believed that a decision in *Hernández* might, at a very high level of generality, affect the proper analysis of petitioner's *Bivens* claim, it still would not be appropriate to hold this case. As already noted, the court of appeals affirmed the district court's judgment "[f]or two independent reasons." Pet. App. 2. And nothing that this Court says in *Hernández* will affect the court of appeals' alternative holding that Agent Garza was entitled to qualified immunity on the specific facts of this case. See *id.* at 13. Thus, even in the unlikely event that this Court's decision in *Hernández* were to alter the court of appeals' analysis of the *Bivens* question in this case, that would not provide a basis for vacating the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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