No. 19-718

In The
Supreme Court of the United States

JAMES KING,

Cross-Petitioner,

v.

DOUGLAS BROWNBACK, ET AL.,

Cross-Respondents.

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

REPLY BRIEF FOR THE CROSS-PETITIONER

PATRICK JAICOMO
Counsel of Record
KEITH NEELY
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
pjaicomo@ij.org
kneely@ij.org

ANYA BIDWELL
INSTITUTE FOR JUSTICE
816 Congress Avenue
Suite 960
Austin, TX 78701
(512) 480-5936
abidwell@ij.org

D. ANDREW PORTINGA
MILLER JOHNSON
45 Ottawa Avenue SW
Suite 1100
Grand Rapids, MI 49503
(616) 831-1700
portingaa@millerjohnson.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY ARGUMENT

James King cross-petitions this Court to consider whether members of joint state-federal police task forces are categorically immune from liability under 42 U.S.C. 1983.

If this Court grants the officers' petition for certiorari, the issue presented in King's cross-petition will arise, regardless of whether this Court affirms or reverses the Sixth Circuit's analysis of the FTCA's judgment bar, 28 U.S.C. 2676. If, as it did in *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1850 (2016), this Court affirms the Sixth Circuit's analysis, the judgment bar will shield neither officer. If, as the officers presume in their response, this Court reverses the Sixth Circuit's analysis, the judgment bar will shield Brownback, an FBI special agent, but not Allen, a Grand Rapids police detective. Either way, the issue King raises in his cross-petition will need to be decided.

There is also a circuit split over that important issue. With the court's application of a categorical rule, the law in the Sixth Circuit now conflicts with the law in the Third and Seventh Circuits. As a result, had the officers confronted King in Illinois or Pennsylvania, they would have been subject to liability under Section 1983. But because the officers confronted King in Michigan, they are not.

This Court should consider both petitions or neither.

I. If this Court grants the officers' petition, the issue presented in King's cross-petition will arise.

The officers argue both incorrectly and presumptuously that "the question presented by the cross-petition would not arise" "[i]f this Court were to grant the officers' petition *and reverse*." Gov't Br. 7 (emphasis added).

The officers are wrong to presume that a grant would lead to reversal. That is especially true because the last time this Court granted the Solicitor General certiorari to consider the judgment bar, it rejected the government's expansive interpretation and affirmed the Sixth Circuit's more-restrictive holding. *Simmons*, 136 S. Ct. at 1850. If it does so again, the judgment bar will immunize neither Brownback nor Allen, and the issue presented in King's cross-petition will be essential to this Court's disposition of the case because it will dictate whether the officers are subject to liability under Section 1983 or *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

But even if the government's interpretation prevails and this Court grants to reverse, the issue presented in King's cross-petition will arise because the FTCA's judgment bar does not apply to Allen. As the officers have consistently maintained, Allen is not subject to King's FTCA claims. See, *e.g.*, Resp. Br. at 3 n.2, *Brownback* v. *King*, No. 19-546 (Jan. 21, 2020). In the district court, for example, the officers wrote that "King

and his counsel[made the] deliberate choice to pursue liability for Officer Allen's conduct under § 1983 and *Bivens* only." D. Ct. Doc. 72, at 58–59. The officers cannot eat their cake and have it too: if King did not pursue liability for Officer Allen's conduct under the FTCA, Allen is not entitled to the protection of the FTCA's judgment bar. Thus, no matter if this Court sides with the government or King, it will have to address whether the officers acted under color of state law.

II. There is a circuit split over whether task force members are immune from liability under Section 1983.

The rest of the officers' arguments hinge on the incorrect premise that the Sixth Circuit did not apply a categorical rule to task force members. See, *e.g.*, Gov't Br. 10. It did, and the decision below already has been cited for that rule.

A. The Sixth Circuit created a categorical rule that task force members are immune from liability under Section 1983.

Although the Sixth Circuit recited the correct standard for determining whether a person acts under color of state law, Pet. App. 34a–35a, it erred in its application of that standard. As a result, it held that task force members act exclusively under color of federal law and, thereby, categorically immunized task force members from Section 1983.

The court arrived at its categorical rule in two steps. First, it confused the relevant factors to be considered. In analyzing whether a government official acts under color of state law, a court must determine whether the official's *actions* were fairly attributable to the state. *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 937 (1982) (considering the "fair attribution" of the "conduct" allegedly causing the deprivation of a right). But the Sixth Circuit did not look to the officers' actions. Instead, it looked to the "source and implementation of authority for the [task force] *program*." Pet. App. 37a.

After improperly shifting focus from the officers' actions to the task force program, the court compounded its error by presupposing—contrary to the record evidence—that "the FBI manage[s] the operation[of task forces] with the benefit of state resources," Pet. App. 36a,[1] thereby rendering all task force actions "an exercise of federal authority," Pet. App. 37a.[2] Thus,

---

[1] As noted in King's Cross-Petition at 9 n.1, the "[o]verall management of the [task force was] the shared responsibility of the participating agency heads[.]" D. Ct. Doc. 73-2, at 505.

[2] The Sixth Circuit also erroneously stated that King did not "explain why the 'nature and character' of a task force should change based on whether the task force chooses to pursue a state fugitive or a federal fugitive" or contest that "the task force's decision to apprehend [the fugitive] was made by virtue of an exercise of federal authority." Pet. App. 37a. King did both. See King C.A. Br. 60–63 (explaining why the officers' actions govern the analysis in a section of the brief entitled, "In this case, there is ample evidence demonstrating that the officers were acting under color of state law") and 63–65 (contesting federal authority in a

under the Sixth Circuit's flawed application of the standards and because joint task force programs are implemented through (some degree of) federal authority, members of those task forces act exclusively under color of federal law. They are, therefore, immune from liability under Section 1983.

For these reasons, the officers' argument that the Sixth Circuit did not adopt a categorical rule is incorrect. It did, and at least one other federal court has already cited that rule. See *Polak* v. *City of Omaha*, No. 8:18CV358, 2019 WL 1331912, at *5 (D. Neb. Mar. 25, 2019) (citing *King* in support of the United States Attorney's argument that a state officer was immune from Section 1983 liability for executing a state warrant because "at the time of [the] arrest [the officer] was working * * * as a deputized Special Deputy U.S. Marshal with the Metro Area Fugitive Task Force").

B. By applying a categorical rule, the Sixth Circuit exacerbated an existing circuit split.

By applying a categorical rule, the Sixth Circuit joined the First and Second Circuits in conflict with the Third and Seventh. The officers attempt to minimize the split by arguing that, although the First and Second Circuits also applied a categorical rule, the parties in those circuits assented to that rule. Gov't Br. 11 (citing *Guerrero* v. *Scarazzini*, 274 Fed. Appx. 11, 12 n.1

---

section of the brief entitled, "Allen and Brownback's actions were contrary to FBI guidelines").

(2d Cir. 2008), and *DeMayo* v. *Nugent*, 517 F.3d 11, 14 n.5 (1st Cir. 2008)).[3]

Regardless of the parties' assent, however, the circuits applied the rule. For example, in *Guerrero*, although the parties apparently "agree[d]," the *court* held that "because [two New York City police detectives] were federally deputized for their Task Force work, this claim was properly brought * * * as a *Bivens* action." *Guerrero*, 274 Fed. Appx. at 14 n.5; see also *DeMayo*, 517 F.3d at 12–13. Accordingly, just as King asserts, the categorical rule controls in the First, Second, and Sixth Circuits.

Furthermore, the officers do not dispute that the Third and Seventh Circuits properly look beyond an officer's label and consider the circumstances surrounding his or her acts. *Couden* v. *Duffy*, 446 F.3d 483, 499 (3d Cir. 2006); *Johnson* v. *Orr*, 780 F.2d 386, 393 (3d Cir. 1986); *Askew* v. *Bloemker*, 548 F.2d 673, 677 (7th Cir. 1976). As a result, task force members may be subject to Section 1983 for actions taken in Chicago or Philadelphia, but not for actions taken in Grand Rapids, Boston, or New York.

---

[3] The officers ignore King's citation to nine district court decisions applying the same categorical rule. See Cross-Pet. 19 n.13.

C. The officers' arguments highlight the importance of this Court's consideration of King's cross-petition.

The Sixth Circuit's categorical rule turns *Lugar* on its head. Under *Lugar*, the lodestar for determining whether an officer acts under color of state law is whether the officer's "conduct is * * * chargeable to the State." 457 U.S. at 937.

The officers concede that they were enforcing a Michigan warrant at the request of a Michigan police chief for a Michigan crime committed in Michigan by a Michigan resident. Even so, the officers argue that "those facts bear only a tangential relationship to the source of the officers' authority for their actions in this case." Gov't Br. 10. But under *Lugar*, those facts are not tangential; they are essential, and they prove that Michigan supplied the only possible authority for the officers to make any arrest at all.

To support their position that they acted under color of federal law, the officers contend that they "were working on an investigation that had been authorized by the FBI supervisory agent to determine whether there was probable cause to believe that [the fugitive] had left the State of Michigan to evade prosecution, in violation of the Fugitive Felon Act." Gov't Br. 8 (internal quotation marks and citation omitted). But if the officers believed King was the fugitive, they had no probable cause to support a federal arrest because they located him in the city where the fugitive had

committed the crime. And if the fugitive had not fled the state, the officers had no federal basis to make an arrest. Thus, any federal investigation—proper or improper—concluded the moment the officers believed they saw the fugitive in Michigan.

The State of Michigan supplied the only possible authority for the officers to make an arrest.[4] If the officers' actions do not fall under color of state law, *Lugar* is a dead letter.

[4] Further highlighting the split of authority on this issue, compare the officers' analysis to the Seventh Circuit's in *Askew*. There, the court held that a St. Louis police officer working as a "dual-status agent" "could not have acted under color of state law at the Askew residence in Collinsville, Illinois, *as it was outside his jurisdiction as a St. Louis police officer*." 548 F.2d at 677 (emphasis added). Applying *Askew*, the officers could not have acted under color of federal law in apprehending the fugitive as it was outside their jurisdiction as federal police officers.

CONCLUSION

If this Court grants the officers' petition, it should also grant King's cross-petition.

Respectfully submitted,

PATRICK JAICOMO
Counsel of Record
KEITH NEELY
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
pjaicomo@ij.org
kneely@ij.org

ANYA BIDWELL
INSTITUTE FOR JUSTICE
816 Congress Avenue
Suite 960
Austin, TX 78701
(512) 480-5936
abidwell@ij.org

D. ANDREW PORTINGA
MILLER JOHNSON
45 Ottawa Avenue SW
Suite 1100
Grand Rapids, MI 49503
(616) 831-1700
portingaa@millerjohnson.com