No. _____

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The use of joint state-federal police task forces has expanded nationwide and along with it the related practice of federally deputizing state law enforcement officers as task force members. Although this Court has explained that a federal law enforcement officer can act "under color of state law" for purposes of liability under 42 U.S.C. 1983, there is a split of authority among the circuit courts regarding whether a law enforcement officer's membership in a task force renders his or her actions "under color of federal law" and provides per se immunity from liability under Section 1983.

Does a law enforcement officer's membership in a joint state-federal police task force managed, in part, by a federal agency preclude him or her from acting "under color of state law" for purposes of Section 1983?

PARTIES TO THE PROCEEDINGS

Cross-petitioner is plaintiff James King. Cross-respondents are defendants Special Agent Douglas Brownback of the Federal Bureau of Investigation and Detective Todd Allen of the City of Grand Rapids, Michigan, Police Department.

RELATED PROCEEDINGS

United States District Court (W.D. Mich.):

King v. *United States*,
No. 16-cv-343 (Aug. 24, 2017)

United States Circuit Court (6th Cir.):

King v. *United States*,
No. 17-2101 (Feb. 25, 2019), petition for reh'g en banc denied, May 28, 2019.

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CROSS-PETITION FOR A WRIT OF CERTIORARI

King conditionally cross-petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit, Pet. App. 1a, is reported at 917 F.3d 409. The opinion of the United States District Court for the Western District of Michigan, Pet. App. 46a, is not reported but is available at 2017 WL 6508182.

JURISDICTION

The Sixth Circuit entered its opinion below on February 25, 2019. The officers' petition for rehearing en banc was denied on May 28, 2019. On August 18, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including September 25, 2019. On September 16, Justice Sotomayor further extended the time within which to file a petition for a writ of certiorari to and including October 25, 2019. The officers filed a petition for a writ of certiorari on that date. King timely files this conditional cross-petition and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Civil Rights Act of 1871, 42 U.S.C. 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

STATEMENT

The intermingling of state and federal law enforcement officers through the rise of joint state-federal police task forces requires victims of constitutional violations to play a cruel shell game. Plaintiffs must guess whether to bring claims under 42 U.S.C. 1983 (for constitutional violations committed under color of state law); *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (for constitutional violations committed under color of federal law); the FTCA (for torts committed by federal employees); or some combination thereof, while the government hides the ball beneath shifting state and federal authority.

In their petition, FBI Special Agent Douglas Brownback and Grand Rapids, Michigan, Police Detective Todd Allen (the "officers") attempt to do just that by asking this Court to (1) treat a Michigan police officer enforcing Michigan law as a federal employee; (2) allow the Federal Government to assume the Michigan officer's liability for unconstitutionally executing a Michigan warrant as part of a joint state-federal police task force; (3) provide the Federal Government immunity under Michigan law; and (4) for that reason, provide the officers immunity under the FTCA's judgment bar. By swapping between state and federal authority, the officers argue that they cannot be held accountable for unconstitutionally stopping, searching, beating, and arresting James King, an innocent college student the officers unreasonably misidentified as a fugitive.

In his conditional cross-petition, King asks the Court to consider whether a task force member's unconstitutional acts can be remedied under Section 1983 or whether they must be pursued under *Bivens*. Below, the Sixth Circuit held that task force members categorically act under color of federal law and, therefore, can only be sued under *Bivens*. Although the officers were in Michigan executing a Michigan warrant against a Michigan resident suspected of a Michigan crime at the request of a Michigan police chief, the Sixth Circuit held that the officers were not acting under color of state law; their task force membership immunized them from liability under Section 1983. That opinion represents one side of a circuit split.

Because the officers' task force membership raises issues under the FTCA, Section 1983, and *Bivens*, this Court should grant the petition and cross-petition together or deny both. If it addresses the application of the FTCA to task force members, this Court should also address the application of Section 1983 and *Bivens*.

I. Members of a joint state-federal police task force acting under a Michigan warrant unreasonably misidentified King as a Michigan fugitive and unconstitutionally stopped, searched, beat, and arrested him.

On the afternoon of Friday, July 18, 2014, 21-year-old college student James King was walking between his two summer jobs in Grand Rapids, Michigan. He came upon two men leaning against a black SUV. Unbeknownst to King, these men were members of a joint fugitive task force operated by the FBI and the Grand Rapids Police Department. Pet. App. 2a; D. Ct. Doc. 73-2, at 505. That task force was "supervised" by the FBI, but "[o]verall management of the [task force was] the shared responsibility of the participating agency heads[.]" D. Ct. Doc. 73-2, at 505.

One man leaning on the SUV was Grand Rapids Police Detective Todd Allen. The other was FBI Special Agent Douglas Brownback. Both men were in scruffy street clothes, not uniforms. Pet. App. 2a. Allen's appearance is pictured below:

Doc. 36, at 19.

The officers were looking for fugitive Aaron Davison, who was wanted on a Michigan warrant for a home invasion he committed in Grand Rapids. The description of Davison from which the officers were working was very broad. They knew only that Davison was a 26-year-old white male between 5'10" and 6'3" with glasses; short, dark hair; and a thin build. Pet. App. 2a–3a.

The officers had a seven-year-old driver's license photo of Davison and a more recent Facebook photo, where Davison's face was not visible:

Davison Driver's License Photo

Davison Facebook Photo

Pet. App. 3a, 18a.

The officers did not find Davison, but they did find King. Five years younger than Davison, King did not bear a resemblance to either photograph of Davison the officers had:

Doc. 36, at 21. But because King was a white male with glasses between 5'10" and 6'3" tall, the officers stopped him. Pet. App. 3a.

King did not realize that the men who stopped him were law enforcement officers. Pet. App. 2a–4a. Neither Brownback nor Allen identified himself, and King did not recognize that both officers were wearing lanyards with badges. Pet. App. 2a–4a.

Allen asked King who he was. King replied, "James." Allen then asked King for identification, and King said he did not have any. The officers put King up against their vehicle. Allen then removed King's wallet, prompting King to ask, "Are you mugging me?" King turned and tried to run, but Allen tackled him to the ground. King shouted for help, begging passersby to call the police, but Allen choked King unconscious. Pet. App. 3a–4a.

After regaining consciousness, King tried to save his own life by biting Allen in the arm that was still around King's neck. Allen then, as he later testified, beat King in the head and face "as hard as I could, as fast as I could, and as many times as I could." Pet. App. 4a.

Responding to King's pleas for help, bystanders called the police, and uniformed officers eventually arrived. Like King, the bystanders did not know that Allen and Brownback were law enforcement officers. 4a–5a.

Grand Rapids police officers took King from the scene to the emergency room. Despite realizing that King was not the sought-after fugitive, officers moved King from the hospital to the county jail and charged

him with several felonies related to his interaction with the officers. Pet. App. 5a.

The Kent County, Michigan, prosecutor pursued felony charges against King for assaulting a police officer and causing injury, assaulting a police officer, and assault with a dangerous weapon. D. Ct. Doc. 74-8, at 1. A jury acquitted King on all charges. Pet. App. 5a.

II. The district and circuit courts held that the officers are immune from liability under Section 1983 because of their task force membership.

On April 4, 2016, King filed this lawsuit in the United States District Court for the Western District of Michigan. Because the officers are an FBI agent and a Grand Rapids city police detective, King was unsure of the appropriate claims to bring. Accordingly, King alleged alternative counts against the officers: one under Section 1983 and one under *Bivens*. He also brought a count under the FTCA. In lieu of answering, the officers filed a motion to dismiss.

On August 24, 2017, the district court dismissed all of King's claims. The court held that because the officers were members of a task force, King could not pursue claims under Section 1983. Pet. App. 56a–57a ("[Section] 1983 does not apply to federal Task Force officers working on an open federal investigation."). The district court acknowledged that the officers acted pursuant to a Michigan warrant for a Michigan crime. Pet. App. 56a. But the fact that the officers were acting

under color of state law "under a cooperative federalism scheme d[id] not change the [court's] analysis." Pet. App. 56a. Additionally, the court found that even though *Bivens* claims were technically available to King, qualified immunity shielded the officers from liability for those claims. Pet. App. 60a–68a.

King appealed. In the Sixth Circuit, the officers argued that King's constitutional claims were foreclosed by the FTCA's judgment bar because the district court had dismissed King's FTCA claim and that, in any case, the court had correctly granted the officers qualified immunity. Although the Sixth Circuit agreed with the district court that the officers could not be sued under Section 1983 because they were task force members,[1] Pet. App. 34a–37a, it rejected the officers' FTCA argument, held that the officers were not entitled to qualified immunity, and remanded King's claims to proceed under *Bivens*. Pet. App. 38a.

After the Sixth Circuit denied the officers' request for rehearing en banc, the officers filed a petition for a

[1] Although King argued on appeal that both officers were acting under color of state law, the Sixth Circuit only addressed King's arguments regarding state officer Allen. It also mistakenly presumed that the task force is "managed" by the FBI and incorrectly stated that King had "not alleged or demonstrated that the state was involved in authorizing or administering the task force." App. 36a. To the contrary, the task force is managed jointly by the FBI and the Grand Rapids Police Department, D. Ct. Doc. 73-2, at 505, and King explained at length how the state was involved in "authorizing" the task force. See, *e.g.*, Doc. 36, at 75 (noting, among other things, "Absent the state warrant, Mich. Comp. Laws § 764.15d, *and* the request of the Grand Rapids Police Chief, the FBI could not arrest Davison in Grand Rapids.").

writ of certiorari, asking this Court to expand the immunities provided to federal employees under the FTCA's judgment bar, 28 U.S.C. 2676.

REASONS FOR GRANTING THE CROSS-PETITION

If this Court grants the officers' petition to consider the application of the FTCA to task force members, it should also grant King's cross-petition to consider the application of Section 1983 and *Bivens*. Because the officers' task force membership intertwines state and federal authority and because the FTCA, Section 1983, and *Bivens* are closely related—and frequently raised as supplemental or alternative claims—this Court should consider all three or none.

The officers' petition illustrates the present confusion about state and federal authority. With the nationwide proliferation of joint state-federal police task forces, courts and plaintiffs have struggled to determine whether task force members act under color of state law, federal law, or both. That distinction is crucial to safeguarding constitutional rights because it dictates the claims a plaintiff can bring.

The long-established test to determine whether a person acts under color of state law for purposes of Section 1983 considers the totality of the circumstances. Under that test, courts have held that state officers, federal officers, and private persons can act under color of state law.

The circuit courts are split, however, on whether the test applies to task force members. In two circuits, the courts have held that it does. In the Sixth Circuit and two others, however, the courts have held that it does not. Rather than consider the totality of the circumstances, these courts hold that task force members categorically act under color of federal, rather than state, law.

Without this Court's guidance, confusion will continue to grow, and an increasing number of plaintiffs will suffer constitutional violations under color of state law without access to the remedy prescribed by Congress in Section 1983.

I. The rise of joint state-federal police task forces has created confusion between acts taken under color of state law, for which Section 1983 provides a cause of action, and acts taken under color of federal law, for which *Bivens* provides a cause of action.

In our federal system, the general police power belongs to the states, not the Federal Government. *Mayor of New York* v. *Miln*, 36 U.S. 102, 139 (1837). "For nearly two centuries it has been clear that, lacking a police power, Congress cannot punish felonies generally." *Bond* v. *United States*, 572 U.S. 844, 854 (2014) (internal quotation marks and citation omitted). But in recent decades, the Federal Government has found a workaround: joint state-federal police task forces.

Virtually unknown for much of American history, these task forces have become commonplace. "Today about a thousand task forces nationwide operate under the direction of the U.S. Marshals, the FBI or the federal Drug Enforcement Administration[.]"[2] That number is growing.[3]

Task forces are charged with policing everything from narcotics to car thefts. The FBI, for example, advertises its involvement with task forces aimed at terrorism, gangs, organized crime, cyber-crimes, white-collar crimes, "Indian Country" crimes, bank robberies, narcotics, kidnappings, motor vehicle thefts, and fugitives.[4]

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[2] Simone Weichselbaum, *Why Some Police Departments Are Leaving Federal Task Forces*, The Marshall Project (Oct. 31, 2019), http://tiny.cc/iey9fz; see *Task Forces*, U.S. Att'y Off. for the W. Dist. Pa., http://tiny.cc/xg99fz (last visited Nov. 15, 2019) (listing nine different task forces in Pittsburgh, Pennsylvania).

[3] In 1979, the FBI and NYPD formed the first state-federal terrorism task force. By 2001, there were 35, and by 2005, there were 103, comprised of more than 5,000 state and federal officers. See, *e.g.*, U.S. Dep't of Justice, *The Department of Justice's Terrorism Task Forces* 15 (June 2005), http://tiny.cc/zlvbgz. "Today there are about 200[.]" *Joint Terrorism Task Forces*, FBI.gov, http://tiny.cc/yf99fz (last visited Nov. 14, 2019). As of 2013, terrorism task force members represented more than 600 state agencies and 50 federal agencies. Jerome P. Bjelopera, Cong. Research Serv., R41780, *The Federal Bureau of Investigation and Terrorism Investigations* 13 (Apr. 24, 2013), http://tiny.cc/fyvbgz.

[4] See, *e.g.*, *Violent Gang Task Forces*, FBI.gov, http://tiny.cc/wj99fz (last visited Nov. 15, 2019) (listing 171 gang task forces operating in 38 states, the District of Columbia, and Puerto Rico); *Safe Trails Task Forces*, FBI.gov, http://tiny.cc/ag99fz (last visited Nov. 15, 2019) (listing 16 task forces in 11 states operated in

Although state-federal composition and administration may vary significantly by task force, members are usually cross-authorized state and federal police officers. State officers are typically deputized as special U.S. Marshals to enforce federal law,[5] while federal officers often operate under state statutes to enforce state law.[6] This dual role allows task force members to select the state or federal laws that best suit their purposes.[7] The result is often a lack of accountability for constitutional violations.[8]

This case highlights several problems created by the task force shell game and why it raises an important issue. While violations committed by officers "under color of state law" can be pursued through a statutory cause of action provided by Congress in Section 1983, violations committed by officers "under color of federal law" must be pursued through an implied

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cooperation with "state, local, and tribal law enforcement agencies"); *Frequently Asked Questions*, FBI.gov, http://tiny.cc/bg99fz (last visited Nov. 15, 2019).

[5] See Weichselbaum (noting that U.S. Marshals deputized one-third of the Pensacola Police Department's 161-officer force during the summer of 2019).

[6] See, *e.g.*, Mich. Comp. Laws § 764.15d (West 2019) (setting forth the criteria under which a "federal law enforcement officer may enforce state law."); Cal. Penal Code § 830.8 (West 2019); Va. Code Ann. § 15.2-1726 (West 2019).

[7] See, *e.g.*, Michael Maharrey, *Local Cops Can Skirt State Limits on Surveillance by Joining Federal Task Forces*, Found. for Econ. Educ. (May 7, 2019), http://tiny.cc/df99fz.

[8] See, *e.g.*, Kade Crockford, *Beyond Sanctuary: Local Strategies for Defending Civil Liberties*, Century Found. (Mar. 21, 2018), http://tiny.cc/2gmigz.

cause of action articulated by this Court in *Bivens*. In the past, it was simple for plaintiffs and courts to determine whether officers acted under state or federal law. State officers acted under color of state law, and federal officers acted under color of federal law. That is no longer the case.

Although Section 1983 and *Bivens* are viewed as analogous, the differences between them are consequential to plaintiffs. Section 1983 provides a much better chance for success: plaintiffs succeed in nearly 60% of Section 1983 cases,[9] while only 16% of plaintiffs succeed under *Bivens*.[10] This is perhaps because Section 1983 must be "liberally and beneficially construed" with "the largest latitude consistent with the words employed," while courts apply *Bivens* cautiously. Compare *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400 n.17 (1979) (internal quotation marks and citation omitted), with *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857, 1863 (2017) (holding that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity" and "when alternative methods

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[9] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 47 (2017) (finding that plaintiffs succeeded in 57.7% of the cases in a five-district study).

[10] Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 Stan. L. Rev. 809, 837 (2010) (finding that plaintiffs succeeded in approximately 16% of cases in a five-district study). Notwithstanding Reinert's results, other studies of *Bivens* have concluded that the success rate is lower than 1%. See *Crawford-El* v. *Britton*, 93 F.3d 813, 838 (D.C. Cir. 1996) (Silberman, J., concurring) (citation omitted); *Laswell* v. *Brown*, 683 F.2d 261, 269 (8th Cir. 1982).

of relief are available, a *Bivens* remedy usually is not") (citation omitted). Finally, a plaintiff who succeeds on a Section 1983 claim can recover attorney fees under 42 U.S.C. 1988(b), while a plaintiff who succeeds under *Bivens* cannot.

It is no wonder that the government fights for task force members to avoid Section 1983 claims. If officers cannot avoid accountability altogether through some form of immunity—*e.g.*, qualified immunity, governmental immunity, or immunity under the FTCA judgment bar—*Bivens* gets them most of the way there. Unfortunately, some courts, such as the Sixth Circuit below, have helped officers avoid Section 1983 claims by rejecting the long-held test to determine whether a person acts under color of state law and holding, instead, that task force members categorically act under color of federal law. As a result, victims of constitutional violations committed by task force members are forced to bring their claims under *Bivens*, even though doing so is inconsistent with Section 1983 and the principles it represents.

II. There is a split of authority among the circuit courts regarding whether task force members should be treated differently than all other persons when evaluating whether they act under color of state or federal law.

Section 1983 provides a cause of action for constitutional violations committed "under color of" state law. That phrase has been interpreted broadly to

include not only the acts of state officers, but those of private persons and federal officers as well. The historic test for determining whether a person acts under color of state law evaluates the totality of the circumstances, but the circuit courts are split on whether that test applies to task force members. Two circuits apply the historic test and consider the totality of the circumstances under which task force members act. Another three circuits, including, now, the Sixth Circuit, instead apply a per se rule that members of joint state-federal police task forces act under color of federal law only

Enacted as part of the Civil Rights Act of 1871, Section 1983 was one means by which Congress exercised the power vested in it by the newly ratified Fourteenth Amendment. *Monroe* v. *Pape*, 365 U.S. 167, 171–187 (1961), overruled on other grounds by *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978).

Section 1983's immediate purpose was to combat the widespread abuses perpetrated by state governments against former slaves and their supporters in the post-war South. *Monroe*, 365 U.S. at 174 (citation omitted). To effect that purpose, Congress used expansive language in Section 1983, creating a direct cause of action against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any * * * person * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws[.]

Acts taken under color of state law include every "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law[.]" *Monroe*, 365 U.S. at 184 (quoting *United States* v. *Classic*, 313 U.S. 299, 325–326 (1941)).

This Court has long held that persons jointly engaged with state officials can act under color of state law. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (quoting *United States* v. *Price*, 383 U.S. 787, 794 (1966) (holding that a private person can act under color of state law)).

To determine whether a person acts under color of state law, this Court looks to the totality of the circumstances. *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). It then considers two factors:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. * * * Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar v. *Edmonson Oil Co.*, 457 U.S. 922, 937 (1982); see *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 620–622 (1991) (applying *Lugar* factors).

Relying in large part on *Lugar*'s test, the circuit courts have held that federal officers, just like private persons, can act "under color of state law."[11] See *Kletschka* v. *Driver*, 411 F.2d 436, 448–449 (2d Cir. 1969) ("We can see no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint action by state officials and private persons.").

Although this Court has never squarely addressed this issue, it came close in *Lake Country*. There, Lake Tahoe property owners brought claims under Section 1983 and *Bivens* against officers of the Tahoe Regional Planning Agency—a body created through a congressionally approved compact between California and Nevada. *Lake Country*, 440 U.S. at 393–394. The officers argued that congressional approval precluded their acts from being under color of state law, and the Ninth Circuit agreed. See *id.* 396.

This Court rejected the Ninth Circuit's conclusion "that the requirement of federal approval of [an] interstate Compact foreclosed the possibility that * * * officers could be found to be 'under color of state law[.]'"

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[11] *E.g.*, *Big Cats of Serenity Springs, Inc.* v. *Rhodes*, 843 F.3d 853, 869–870 (10th Cir. 2016); *Hindes* v. *FDIC*, 137 F.3d 148, 158 (3d Cir. 1998); *Strickland* v. *Shalala*, 123 F.3d 863, 866 (6th Cir. 1997); *Cabrera* v. *Martin*, 973 F.2d 735, 742–744 (9th Cir. 1992); *Olson* v. *Norman*, 830 F.2d 811, 821 (8th Cir. 1987); *Knights of the Ku Klux Klan* v. *East Baton Rouge Par. Sch. Bd.*, 735 F.2d 895, 899–900 (5th Cir. 1984); *Hampton* v. *Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), overruled in part on other grounds by 446 U.S. 754 (1980); *Kletschka* v. *Driver*, 411 F.2d 436, 448–449 (2d Cir. 1969).

Lake Country, 440 U.S. at 399. *Lake Country* further explained that "[e]ven if it were not well settled that § 1983 must be given a liberal construction, these facts adequately characterize the alleged actions of the respondents as 'under color of state law' within the meaning of that statute. * * * [A]nd there is no need to address the question whether there is an implied remedy [under *Bivens*]." *Id.* at 399–400 (footnote omitted).

Notwithstanding that the long-established test to determine whether a person acts under color of state law considers the totality of the circumstances, the circuit and district courts are split on whether that test applies to task force members.

With its opinion below, the Sixth Circuit joins the First and Second Circuits in applying a categorical rule that task force members act under color of federal law, regardless of the circumstances.[12] So too do many district courts.[13] Ignoring *Lugar* and *Lake Country*,

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[12] See Pet. App. 56a–57a; *DeMayo* v. *Nugent*, 517 F.3d 11, 14 n.5 (1st Cir. 2008); *Guerrero* v. *Scarazzini*, 274 Fed. Appx. 11, 12 n.1 (2d Cir. 2008).

[13] *West* v. *Mesa*, 128 F. Supp. 3d 1233, 1240 (D. Ariz. 2015), aff'd, 708 Fed. Appx. 288 (9th Cir. 2017); *Texas* v. *Kleinert*, 143 F. Supp. 3d 551, 562 (W.D. Tex. 2015), aff'd sub nom. *State* v. *Kleinert*, 855 F.3d 305 (5th Cir. 2017); *Pike* v. *United States*, 868 F. Supp. 2d 667, 677–678 (M.D. Tenn. 2012); *Aikman* v. *Cty. of Westchester*, 691 F. Supp. 2d 496, 498 (S.D.N.Y. 2010); *Colorado* v. *Nord*, 377 F. Supp. 2d 945, 949 (D. Colo. 2005); *Tyson* v. *Willauer*, 289 F. Supp. 2d 190, 192 n.1, 193 n.3 (D. Conn. 2003); *Bordeaux* v. *Lynch*, 958 F. Supp. 77, 83–84 (N.D.N.Y. 1997); *Pou* v. *DEA*, 923 F. Supp. 573, 579 (S.D.N.Y. 1996), aff'd sub nom. *Pou* v. *Loszynski*, 107 F.3d 3 (2d Cir.); *Amoakohene* v. *Bobko*, 792 F. Supp. 605, 608 (N.D. Ill. 1992).

these courts hold that if an officer is a task force member, his or her acts are under color of federal law per se. They do not consider the totality of the circumstances. A plaintiff may only proceed under *Bivens*. See *Pettiford* v. *Greensboro*, 556 F. Supp. 2d 512, 534–537 (M.D.N.C. 2008) (discussing the alternative legal frameworks applied when state and federal officers act cooperatively).

The Third and Seventh Circuits disagree.[14] Those circuits, and a number of district courts,[15] look beyond the label of an officer's authority and consider the circumstances surrounding his or her acts to determine whether they were taken under color of state law, federal law, or both.[16] Not only is this approach faithful

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[14] *Couden* v. *Duffy*, 446 F.3d 483, 499 (3d Cir. 2006); *Askew* v. *Bloemker*, 548 F.2d 673, 677 (7th Cir. 1976) (looking at "the totality of the circumstances surrounding the alleged raid" to conclude that the state officers assigned to work with a federal agency "were acting pursuant to federal authority and not under color of any state law"); accord *Johnson* v. *Orr*, 780 F.2d 386, 393 (3d Cir. 1986) ("There is no set formula for determining whether the employees of an agency with both state and federal characteristics act under color of state law. All of the circumstances must be examined to consider whether the actions complained of were sufficiently linked to the state.").

[15] *Pettiford*, 556 F. Supp. 2d at 534–535; *Adams* v. *Springmeyer*, No. 11-790, 2012 WL 1865736, at *5–6 (W.D. Pa. May 22, 2012); cf. *Wilkinson* v. *Hallsten*, No. 5:06CV2, 2006 WL 2224293, at *8 n.7 (W.D.N.C. Aug. 2, 2006), aff'd, 225 Fed. Appx. 127 (4th Cir. 2007); *Macaluso* v. *Dane Cty.*, 537 N.W.2d 148, *3–4 (Wis. Ct. App. 1995) (table).

[16] Some courts have suggested that an officer may act under color of both state and federal law. See *Johnson* 780 F.2d at 392 n.11. Others have rejected that possibility. See *Amoakohene*, 792 F. Supp. at 608.

to Section 1983, *Lugar*, and *Lake Country*, it is also well-suited for application to task forces, which are inherently amorphous and can vary widely in their state-federal compositions and activities. Because such task forces act on a continuum of state and federal authority, the flexible approach articulated in *Lugar* is essential.

III. Because the facts demonstrate that the officers acted under color of state law, this case provides the Court an effective means to resolve the circuit split.

This case provides the Court a good vehicle to address the circuit split because, under the totality of the circumstances, both Allen and Brownback acted under color of state law when they unconstitutionally stopped, searched, beat, and arrested King. The compelling evidence of state-law authority here provides the Court a clean fact pattern to apply *Lugar* to task force members.

Under *Lugar*, King's constitutional deprivations are traceable to authority conferred on the officers by Michigan state law. They executed a Michigan warrant under Michigan's grant of enforcement authority (to Allen as a state officer and Brownback through statute) at the request of a Michigan police chief. The abuse of Michigan authority deprived King of his constitutional rights.

And under *Lugar*, the officers may fairly be said to be state actors. Allen is a Michigan police detective,

who claims to have identified himself as such when he interacted with King. Although he was deputized under Michigan and federal law, Allen was employed and being paid by the City of Grand Rapids and testified that he was carrying two GRPD badges and a GRPD-issued firearm. After the incident, Allen filed a GRPD Incident Report and a GRPD Use of Force Report, and Kent County, Michigan, prosecuted King for assaulting "a police officer of the Grand Rapids Police Department." D. Ct. Doc. 74-8, at 1.

Although Brownback is an FBI agent, he "acted together with [and] obtained significant aid from [a] state official[]." *Lugar*, 457 U.S. at 937. Further, because he was enforcing Michigan law, his only source of authority was a Michigan statute, rendering his conduct "chargeable to the State." *Ibid.*[17]

Because task forces have blurred the line between acts taken under color of state law and acts taken under color of federal law, this Court should consider the petition and cross-petition together or not at all.

[17] In deriving its test, *Lugar* cited *Sniadach* v. *Family Fin. Corp.*, 394 U.S. 337 (1969); *North Ga. Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). All four cases involved issues of state action arising out of a private party's invocation of authority provided by statute. Brownback's source of authority is indistinguishable.

CONCLUSION

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

Respectfully submitted,

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