No. 19-718

In the Supreme Court of the United States

JAMES KING, PETITIONER

v.

DOUGLAS BROWNBACK, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR CROSS-RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
MICHAEL SHIH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that, taking into consideration all the circumstances of this case, cross-petitioner's individual-capacity claims against two law-enforcement officers must be brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), rather than 42 U.S.C. 1983, because the officers' conduct was fairly attributable only to the federal government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 917 F.3d 409.[1] The opinion and order of the district court (Pet. App. 46a-81a) are not published in the Federal Supplement but are available at 2017 WL 6508182.

JURISDICTION

The judgment of the court of appeals (Pet. App. 84a-85a) was entered on February 25, 2019. A petition for rehearing was denied on May 28, 2019 (Pet. App. 82a-83a). On August 18, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including September 25, 2019. On

[1] All references are to the appendix to the petition for a writ of certiorari in No. 19-546 (filed Oct. 25, 2019).

September 16, 2019, Justice Sotomayor further extended the time to and including October 25, 2019, and the petition for a writ of certiorari in No. 19-546 was filed on that date. The conditional cross-petition for a writ of certiorari was filed on November 27, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Cross-petitioner James King sued two law-enforcement officers, Douglas Brownback and Todd Allen, pleading claims under both *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which found an implied a cause of action for certain violations of the federal Constitution by law-enforcement officers acting "under claim of federal authority," *id.* at 389, and 42 U.S.C. 1983, which creates a cause of action for certain violations of the federal Constitution and laws by persons acting "under color of any statute * * * of any State." See Pet. App. 49a-50a. The district court granted the officers' motion to dismiss, or in the alterative, for summary judgment. *Id.* at 46a-81a. The court of appeals vacated and remanded for further proceedings, although the court agreed with the officers that cross-petitioner's individual claims could go forward only under *Bivens*, not Section 1983. *Id.* at 1a-45a.

1. The underlying facts are set forth in the officers' petition for a writ of certiorari (19-546 Pet. 4-11). This case arises from a violent encounter in July 2014 in Grand Rapids, Michigan. See *id.* at 4. While the officers were investigating cross-petitioner on suspicion of being a fugitive, cross-petitioner fled and then violently resisted arrest, causing the officers to use force to subdue him. See *id.* at 4-7.

The officers encountered cross-petitioner while working as "members of a 'joint fugitive task force between the FBI and the City of Grand Rapids.'" Pet. App. 2a (citation omitted); see *id.* at 54a. Brownback was a Special Agent employed by the FBI and assigned to the task force. See *id.* at 54a. Allen was a detective of the Grand Rapids Police Department who worked full time on the task force and was "a federally deputized Special Deputy U.S. Marshal." *Ibid.* The Memorandum of Understanding between the FBI and the Grand Rapids Police Department that governed the task force—which is invoked by cross-petitioner in the cross-petition, see Pet. 4, 9 n.1—specified that the task force's personnel and operations were controlled by a supervisory agent of the FBI. See D. Ct. Doc. 73-2, at 9-10 (Jan. 17, 2017); see also *id.* at 2 (FBI supervisory agent declaring that he had "supervisory responsibility over all personnel and activities of" the task force); Pet. 4 (conceding that the "task force was 'supervised' by the FBI") (citation omitted). At the time of the events in this case, both officers were "act[ing] in an authorized FBI investigation" to apprehend a criminal suspect named Aaron Davison, who was wanted on a warrant by the State of Michigan and who was suspected of having fled the State to avoid prosecution, in violation of the federal Fugitive Felon Act, 18 U.S.C. 1073. Pet. App. 54a; see *id.* at 2a; D. Ct. Doc. 73-2, at 3-4.

2. After cross-petitioner's violent encounter with the officers, he sued the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), 2671 *et seq.* See Pet. App. 49a-50a. Cross-petitioner also brought individual claims against the officers under both *Bivens* and Section 1983. See *ibid.* The district court granted the officers' motion to dismiss, or in the

alterative, for summary judgment. See *id.* at 46a-81a. As relevant here, the court determined that cross-petitioner's individual claims against the officers must be brought under *Bivens*, not Section 1983, because the officers had "acted under color of federal law, not state law," *id.* at 58a; see *id.* at 54a-58a. On the merits, the district court found that the officers had not violated cross-petitioner's constitutional rights or violated state law, so the court dismissed his *Bivens* claims and his FTCA claims. See *id.* at 59a-69a, 75a-80a.

3. a. In the court of appeals, cross-petitioner expressly waived his appeal of the adverse judgment on his FTCA claims, so that his appeal encompassed only his individual claims against the officers. See Cross-Pet. C.A. Br. 18 n.5; Pet. App. 2a. The officers therefore argued that cross-petitioner's individual claims were precluded by the FTCA judgment bar, 28 U.S.C. 2676, which provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." See Pet. App. 6a. A divided panel of the court of appeals rejected the officers' argument for preclusion based on the judgment bar. *Id.* at 6a-12a.[2]

b. Turning to cross-petitioner's individual claims against the officers, the court of appeals agreed with the district court that those claims must be brought under *Bivens*, rather than 42 U.S.C. 1983, because the officers' "conduct is fairly attributable only to the United States and not to the State of Michigan." Pet. App. 36a; see *id.*

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[2] Judge Rogers dissented from the panel majority's conclusion that cross-petitioner's individual claims against the officers were not precluded by the FTCA judgment bar. Pet. App. 39a-45a.

34a-37a. The court observed at the outset that, regardless of whether cross-petitioner's individual claims arose under *Bivens* or Section 1983, the officers' "potential liability is unchanged," because cross-petitioner alleged the same constitutional violations under both causes of action and the officers asserted the same qualified-immunity defense under both. *Id.* at 36a n.10 (citing *Butz* v. *Economou*, 438 U.S. 478, 500-504 (1978)).

In any event, the court of appeals explained that cross-petitioner was incorrect that the officers' conduct in this case arose under color of state law. The court stated that, when a defendant acts pursuant to a "mixed" federal and state program, the "evaluation of whether particular conduct constitutes action taken under the color of state or instead federal law[] must focus on the actual nature and character of that action." Pet. App. 35a (brackets, citation, and internal quotation marks omitted). Here, the court found that, although Detective Allen was employed by the Grand Rapids Police Department, he "was working full time with an FBI task force at the time of the incident at issue." *Id.* at 36a. The court saw no evidence that "the state was involved in authorizing or administering the task force; instead, it appears that the FBI managed the operation with the benefit of state resources." *Ibid.* Furthermore, Allen had been "deputized [as a] federal agent" and "acted under color of that authority" in his encounter with cross-petitioner, "rather than under any state authority he may have had" as a Grand Rapids employee. *Ibid.*

The court of appeals also rejected cross-petitioner's argument that the officers had acted under color of state law "because the task force was enforcing a state warrant" against Davison, the fugitive. Pet. App. 37a.

The court observed that cross-petitioner "d[id] not contest" that "the task force's decision to apprehend Davison was made by virtue of an exercise of federal authority," not state authority. *Ibid.*

c. On the merits of cross-petitioner's *Bivens* claims, the court of appeals concluded, viewing the record in the light most favorable to cross-petitioner, that the officers were not entitled to qualified immunity and were not entitled to summary judgment on some of those claims. Pet. App. 13a-34a. The court therefore vacated the district court's judgment in favor of the officers on those claims and remanded for further proceedings. *Id.* at 38a.

ARGUMENT

Cross-petitioner contends (Pet. 21-22) that the court of appeals should have allowed his individual claims against the officers to go forward under 42 U.S.C. 1983, because the officers "acted under color of state law" in their encounter with him. Pet. 21. He further contends (Pet. 16) that the Sixth Circuit "appl[ied] a per se rule that members of joint state-federal police task forces act under color of federal law only." Cross-petitioner's contentions lack merit. The court of appeals expressly did not apply a "per se rule" regarding law-enforcement officers working on joint federal and state task forces. Rather, the court determined that, based on the totality of the facts in this record, these officers acted pursuant to federal authority when they encountered cross-petitioner. The court's application of settled law to the particular circumstances of this case is correct and does not conflict with any decision of this Court or another court of appeals. The question presented by the conditional cross-petition does not warrant review even alongside the officers' petition for a writ of certiorari.

If this Court were to grant the officers' petition and reverse, the question presented by the cross-petition would not arise. And if the Court were to disagree with the officers on their question presented, cross-petitioner's contention that his constitutional claims in this particular case should proceed under Section 1983 rather than *Bivens*, because the former gives him a statistically better chance of success and the possibility of attorney's fees, would not warrant this Court's review under any standard. The conditional cross-petition should be denied.

1. The court of appeals correctly determined that cross-petitioner's individual claims against the officers can be brought (if at all) only under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), not under 42 U.S.C. 1983. That determination does not warrant further review.

a. Section 1983 applies only to deprivations of federal rights by persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. 1983. This Court has held that Section 1983's state-action requirement limits the cause of action to conduct "fairly attributable to the State." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). And attribution to the State is possible only where two conditions are met. First, the deprivation of federal rights 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." *Ibid.* Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Ibid.* See Pet. App. 35a (quoting *Lugar*); accord Pet. 17.

Applying that test here, the court of appeals correctly held that the officers' alleged deprivations of cross-petitioner's constitutional rights satisfied neither of the two conditions required by *Lugar*. The officers' encounter with cross-petitioner occurred while they were working on an FBI-directed task force in pursuit of federal interests. See Pet. App. 2a, 54a; D. Ct. Doc. 73-2, at 2-3. Brownback was an FBI Special Agent. Pet. App. 2a. Allen, although employed by the Grand Rapids Police Department, was federally deputized as a Special Deputy U.S. Marshal and worked exclusively for the task force. *Ibid.* The task force was established by the FBI, to "apprehen[d] * * * dangerous fugitives where there is or may be a federal investigative interest." D. Ct. Doc. 73-2, at 8. And the Memorandum of Understanding that governs the task force makes clear that all of its personnel and operations are controlled by an FBI supervisory agent, who is responsible for opening, monitoring, directing, and closing all task-force investigations. *Id.* at 9-10. The Memorandum of Understanding further provides that "matters designated to be handled by the [task force] will not knowingly be subject to non-[task force] law enforcement efforts" by either the FBI or the Grand Rapids Police Department. *Id.* at 10. At the time the officers encountered cross-petitioner, 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 Davison had left the State of Michigan" to evade prosecution, in violation of the Fugitive Felon Act. *Id.* at 3-4.

The combination of those facts in this record strongly supports the court of appeals' conclusion that

the officers' conduct challenged here is attributable only to the federal government, not the State.

b. Cross-petitioner contends that the court of appeals erred by applying "a per se rule that members of joint state-federal police task forces act under color of federal law only." Pet. 16; see Pet. 3, 11, 19. But that is not an accurate description of the court's decision. On the contrary, the court expressly stated that "[a] defendant's actions performed pursuant to a mixed federal and state program *may* . . . be actions under color of state law," depending on the circumstances. Pet. App. 35a (emphasis added; citation and internal quotation marks omitted). Moreover, the court used essentially the same "totality of the circumstances" analysis that cross-petitioner advocates, Pet. 11, by stating that "[t]he evaluation of whether particular conduct constitutes action taken under the color of state or instead federal law[] must focus on the actual nature and character of that action," Pet. App. 35a (brackets, citation, and internal quotation marks omitted). The court then explained how the facts in this record, taken together, show that the officers acted pursuant to federal authority rather than under color of state law. See *id.* at 36a-37a.[3]

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[3] In support of his contention (Pet. 19) that "the Sixth Circuit * * * appl[ied] a categorical rule that task force members act under color of federal law," cross-petitioner cites the district court's opinion. See Pet. 19 n.12 (citing Pet. App. 56a-57a). But the district court, like the court of appeals, did not apply a categorical rule to conclude that cross-petitioner's individual claims must be brought under *Bivens* and not Section 1983. Rather, the district court cited *Lugar*'s test (which cross-petitioner endorses), Pet. App. 56a, and based its decision on multiple facts in the record, *id.* at 54a-57a, especially that the officers were "working on an open federal investigation" when they encountered cross-petitioner, *id.* at 56a.

Because the court of appeals did not apply the "per se rule" that cross-petitioner challenges, the question raised by the conditional cross-petition, Pet. i, is not presented by this case, and the cross-petition should be denied for that reason alone.

c. The court of appeals' application of the legal principle that cross-petitioner advocates to the particular facts of this case does not warrant this Court's review. In any event, cross-petitioner's criticisms of the court of appeals' decision lack merit.

Cross-petitioner contends (Pet. 9 n.1, 21-22) that, under the test this Court described in *Lugar*, the officers acted under color of state law because they encountered him while attempting to enforce a Michigan arrest warrant, and because the Chief of the Grand Rapids Police had been required to give assent to the creation of the task force. But those facts bear only a tangential relationship to the source of the officers' authority for their actions in this case. Far more important are the facts that the task force's operations were directed by the FBI, and when the officers encountered cross-petitioner, they were investigating Davison at the direction of the FBI supervisory agent. D. Ct. Doc. 73-2, at 9-10. Moreover, the officers' investigation of Davison was not aimed simply at enforcing the Michigan arrest warrant, but instead at determining whether Davison had fled the State in violation of federal law. *Id.* at 3-4; see Pet. App. 54a.

Cross-petitioner additionally contends that the officers should be viewed as state actors because "Allen was employed and being paid by the City of Grand Rapids"; he carried a Grand Rapids-issued badge and firearm; he reported his encounter with petitioner on a Grand Rapids Police Department form; and Brownback "'acted

together with and obtained significant aid from a state official.'" Pet. 21-22 (brackets and citation omitted). But none of those facts detracts from the fundamentally federal character of the task force's operations and objective, which was to "apprehen[d] * * * dangerous fugitives where there is or may be a federal investigative interest." D. Ct. Doc. 73-2, at 8.

2. Contrary to cross-petitioner's contention (Pet. 3, 11, 15-21), the decision below does not conflict with any decision of another court of appeals. Petitioner's claim to a circuit split depends on his contention (Pet. 19) that "the Sixth Circuit * * * appl[ies] a categorical rule that task force members act under color of federal law, regardless of the circumstances." But as explained above, the Sixth Circuit did not apply any such categorical rule. The court acknowledged that employees working on "mixed" federal and state programs can sometimes act under color of state law, and it simply determined that these officers did not act under color of state law in this case after considering all the relevant facts in the record. See pp. 5-6, 9, *supra*.

Petitioner is similarly incorrect (Pet. 19 & n.12) to attribute to the First and Second Circuits a "categorical" rule that officers working on a joint task force "act under color of federal law." In both of the decisions that cross-petitioner cites, the parties before the courts *agreed* that the plaintiffs' claims arose under *Bivens* rather than Section 1983. See *DeMayo* v. *Nugent*, 517 F.3d 11, 14 n.5 (1st Cir. 2008) (observing that "[t]he parties and the district court * * * all treated the suit as lying under *Bivens*"); *Guerrero* v. *Scarazzini*, 274 Fed. Appx. 11, 12 n.1 (2d Cir. 2008) (observing that "the parties agree" the plaintiff's claim "was properly brought * * * as a *Bivens* action").

Petitioner is also incorrect (Pet. 20 & n.14) that the Third and Seventh Circuits "disagree" with the decision below. The cases that cross-petitioner cites merely reflect the application of a totality-of-the-circumstances test to different fact patterns. One of those decisions even reached the same conclusion as the Sixth Circuit here on similar facts: in *Askew* v. *Bloemker*, 548 F.2d 673, 676-678 (1976), the Seventh Circuit determined that officers working on a joint federal-state investigation that was directed by a federal agency (similar to the FBI task force at issue here) must be sued under *Bivens*, not Section 1983. In *Johnson* v. *Orr*, 780 F.2d 386, cert. denied, 479 U.S. 828 (1986), by contrast, the Third Circuit concluded that a plaintiff's claims against his former supervisors in the New Jersey Air National Guard were properly brought under Section 1983, but only after the court reviewed the facts of "the National Guard's unusual 'hybrid' status as an agency with both federal and state characteristics." *Id.* at 388. Those unusual facts are not present here, so *Johnson* does not conflict with the Sixth Circuit's decision. Finally, cross-petitioner points to *Couden* v. *Duffy*, 446 F.3d 483 (3d Cir. 2006), but the parties in *Couden* do not appear to have disputed whether those plaintiffs' claims should have been brought under *Bivens* or Section 1983, and the Third Circuit had no occasion to reach that question. See *id.* at 491-492.

3. Cross-petitioner's decision to file a conditional cross-petition recognizes that, in the absence of the officers' petition for a writ of certiorari, the question raised by his cross-petition would not warrant this Court's review. That additional question also does not warrant review alongside the officers' petition.

If this Court were to grant review of the conditional cross-petition together with the officers' petition, and were to agree with the officers (19-546 Pet. 12-14) that the judgment on cross-petitioner's FTCA claims is a "complete bar" that precludes him from pursuing "any" claims arising from the same subject matter against the officers, 28 U.S.C. 2676—regardless of whether those claims arise under Section 1983 or *Bivens*—then the question presented by the cross-petition would not arise. And even if this Court were to conclude that the FTCA judgment bar does not apply here, the only question raised by the cross-petition would be whether cross-petitioner's claims in this particular case should go forward under Section 1983 or *Bivens*. But under either source of law, cross-petitioner would be asserting the same constitutional violations, subject to the same defenses. See Pet. App. 36a n.10. Cross-petitioner simply contends (Pet. 14-15) that Section 1983 would afford him a statistically better chance of success and the possibility of attorney's fees. Especially in the absence of any circuit conflict, that is not the sort of question that would warrant this Court's review under any standard.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
MICHAEL SHIH
Attorneys

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