No. _____

In The
# Supreme Court of the United States

MASON MURPHY,
*Petitioner*,

v.

MICHAEL SCHMITT, OFFICER,
SUED IN HIS INDIVIDUAL CAPACITY,
*Respondent*.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Eighth Circuit

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Under *Nieves* v. *Bartlett*, probable cause does not bar a retaliatory-arrest claim when the plaintiff shows "that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. 1715, 1727 (2019). The circuits disagree on how to satisfy this standard, and this Court granted certiorari in *Gonzalez* v. *Trevino*, No. 22-1025, to address the conflict.

Specifically, the circuits disagree on whether courts may consider allegations that no one else has been arrested for the same conduct. Compare *Ballentine* v. *Tucker*, 28 F.4th 54, 60 (CA9 2022), with Pet.App.5a–6a (CA8 2023) (2-1 decision, with Grasz, J., dissenting), and *Gonzalez* v. *Trevino*, 42 F.4th 487, 493 (CA5 2022). They also disagree on whether courts may consider an arresting officer's statements made after an arrest. Compare *Lund* v. *City of Rockford*, 956 F.3d 938, 945 (CA7 2020), with Pet.App.6a (CA8 2023) (2-1 decision, with Grasz, J., dissenting), and *Gonzalez*, 42 F.4th at 493.

The questions presented are:

1. Whether the *Nieves* probable-cause exception allows courts to consider allegations that no one else has been arrested for the same crime.

2. Whether the *Nieves* probable-cause exception allows courts to consider an arresting officer's statements made after an arrest.

Here, the petitioner engaged in protected speech when talking with a police officer, who arrested him.

Probable cause supported the arrest because the officer saw the petitioner walking on the wrong side of a rural road. The petitioner sued, alleging that officers usually do not arrest for walking on the wrong side of the road and no one in the county had been arrested for that crime in recent memory. Video footage also shows that, while at the jail after the arrest, the officer asked what he could charge the petitioner with and made other remarks indicating that similarly situated people would not have been arrested.

## PARTIES TO THE PROCEEDING

Petitioner Mason Murphy was the plaintiff in the district court and the appellant in the Eighth Circuit.

Respondent Michael Schmitt was an individual defendant in the district court and the appellee in the Eighth Circuit.

Individual defendant Jerry Pedigo and defendant Camden County, Missouri, were parties in the district court and are not a part of the petitioner's appeal.

## RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Murphy* v. *Schmitt*, *et al.*, No. 22-1726 (CA8 Dec. 12, 2023) (denying rehearing en banc);
- *Murphy* v. *Schmitt*, *et al.*, No. 22-1726 (CA8 Sept. 6, 2023) (affirming grant of Schmitt's motion to dismiss); and
- *Murphy* v. *Schmitt, et al.*, No. 2:21-cv-4195, (W.D. Mo. Feb. 28, 2022) (granting Schmitt's motion to dismiss).

There are no other related proceedings in state or federal trial or appellate courts, or in this Court, under Supreme Court Rule 14.1(b)(iii).

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## PETITION FOR A WRIT OF CERTIORARI

Mason Murphy petitions for a writ of certiorari to review the Eighth Circuit's judgment in this case.

## OPINIONS BELOW

The Eighth Circuit's per curiam opinion and the dissenting opinion (Pet.App.1a) are unpublished, not reported, and are available at 2023 WL 5748752. The district court's opinion (Pet.App.13a) is not reported and is available at 2022 WL 1060492.

## JURISDICTION

The judgment of the court of appeals was entered on September 6, 2023. Pet.App.1a. On December 12, 2023, the court denied Murphy's timely petition for rehearing and rehearing en banc, with three judges voting to grant rehearing en banc. Pet.App.25a–26a. On February 7, 2024, Justice Kavanaugh extended the time to petition for a writ of certiorari to May 10, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech, or of the press." U.S. Const. amend. I.

The Civil Rights Act of 1871 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 * * * ." 42 U.S.C. 1983.

Section 300.405.2 of Missouri's statutes provides: "Where sidewalks are not provided any pedestrian walking along and upon a highway shall when practicable walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction." Mo. Rev. Stat. § 300.405.2.

## INTRODUCTION

This petition concerns a retaliatory-arrest claim under 42 U.S.C. 1983. It raises two questions about the *Nieves* probable-cause exception. This Court may address both in *Gonzalez* v. *Trevino*, No. 22-1025.

In *Nieves* v. *Bartlett*, the Court used jaywalking as an example of conduct that would allow a claim to fit the probable-cause exception. 139 S. Ct. 1715 (2019). This case asks whether walking along, rather than across, a road also allows a claimant to satisfy the exception.

Here, Mason Murphy was walking on the side of a rural road when an officer stopped him and ordered him to identify himself because—in the officer's words—"I didn't want him walking down my highway." Pet.App.42a ¶119. Murphy spent nine minutes engaging in speech protected by the First Amend-

ment, questioning and arguing with the officer. The officer then arrested him and took him to jail.

At the jail, the officer struggled to come up with a crime to justify the arrest. He called a senior officer for help and said he would call a prosecuting attorney for more help. Murphy spent two hours locked in jail before officers released him. He was never charged with a crime based on the incident.

Murphy sued the officer for arresting him in retaliation for his protected speech. Murphy acknowledged that the officer had probable cause to arrest him because under Missouri law, Murphy was walking on the wrong side of the rural road. But Murphy alleged that his claim could proceed under *Nieves*, which held that probable cause does not bar a retaliatory-arrest claim when the plaintiff presents "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1727. Murphy argued his claim fits this exception in part because (1) no one else in the county has been arrested for walking on the wrong side of the road and (2) a video recording shows the officer at the jail making statements indicating that similarly situated individuals who did not engage in the same kind of speech would not have been arrested.

In the Seventh and Ninth Circuits, courts may consider these allegations. But in the Fifth and Eighth Circuits, courts may not. Because the Eighth Circuit disregarded Murphy's allegations on these topics, it dismissed his claim.

If the Court addresses in *Gonzalez* whether courts may consider either type of allegation, then the Court should grant this petition and vacate and remand the decision below for reconsideration in light of *Gonzalez*. That is because if the court below had considered Murphy's allegations that no one else has been arrested for the same crime, the outcome may have been different. Likewise, had the court below considered the arresting officer's statements made at the jail, the outcome may have been different. So, if *Gonzalez* provides guidance about either of these kinds of evidence or criteria for considering evidence, granting the petition and vacating and remanding is appropriate.

If *Gonzalez* does not reach whether courts may consider either type of allegation, then the Court should grant this petition and answer the questions presented here.

## STATEMENT OF THE CASE

### A. Factual background[1]

1. *The Arrest.* Sunrise Beach is a small village of about 500 residents near the Lake of the Ozarks in central Missouri. One night in Sunrise Beach, petitioner Mason Murphy was minding his own business, peacefully walking on the side of a rural road. Because there was no sidewalk, he walked on the road's large shoulder. He was not under the influence of alcohol or any other substance. He was not stumbling or showing any signs of impairment. He was not

[1] Because this case is here on the respondent's motion to dismiss, we recite the facts in the light most favorable to the petitioner.

wanted for a suspected crime. And he showed no signs of distress. Pet.App.30a ¶¶12–15, 33a ¶¶34–38, 34a ¶41, 35a ¶49, 39a ¶91, 41a ¶¶105–107.

A Sunrise Beach police officer, respondent Michael Schmitt, was driving his patrol vehicle down the same road and saw Murphy walking. Schmitt stopped his vehicle behind Murphy and approached him on foot. As Schmitt would later explain, he did this because, "I didn't want him walking down my highway." Pet.App.30a ¶¶16–17, 31a ¶19, 42a ¶119.

Rather than offer Murphy a ride or engage in casual conversation, Schmitt demanded that Murphy identify himself. Murphy questioned the officer's reasons and declined to identify himself.[2] Murphy repeatedly asked Schmitt what crime he had committed and argued about Schmitt's demand that Murphy identify himself; Schmitt argued back. Murphy was calm, stable on his feet, and compliant except for the officer's demand that he identify himself. Pet.App.31a ¶24, 32a ¶30, 33a ¶¶35–39; Video 00.00–08.55.

After about nine minutes of argument, Schmitt put Murphy in handcuffs and into the back of the patrol vehicle. On the way to the county jail, Murphy continued to orally contest the lawfulness of Schmitt's actions. He called Schmitt names and criticized and insulted him, including for not wearing a seat belt. But Murphy was not violent. Schmitt argued with

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[2] Schmitt's body camera captured much of what transpired shortly after Schmitt first detained Murphy. The footage was linked in the complaint and is available at https://www.youtube.com/watch?v=ZhdaU4q22fY. References to the video are denoted "Video hr.min.sec."

Murphy and called him degrading names, too. In short, both men were rude and abrasive in their comments to each other. Pet.App.34a ¶42, 35a ¶54, 36a ¶59, 37a ¶70, 38a ¶74; Video 08.50–34.44.

2. *Prolonged Detention and Comments at the Jail.* About 25 minutes after Schmitt placed Murphy in handcuffs and into the patrol vehicle, Schmitt parked at the jail's sally port. Schmitt exited the vehicle, leaving Murphy handcuffed in the back seat. Schmitt made a phone call and told the person on the other side—Scott Craig, the current Police Chief of Sunrise Beach—that Murphy had been walking on the side of the road and was "refusing to identify himself" so Schmitt had brought him to jail. Schmitt asked, "What can I give him?"—meaning "What can I charge him with or hold him on?" Craig answered, "I don't know," and told Schmitt to call the on-call prosecutor to see what they say, because unless Murphy was intoxicated, "there's really not anything" and "that's gonna be a tricky one."[3] Pet.App.38a ¶¶77–78, 82; Video 34.44–38.57.

Schmitt next took Murphy into a room at the jail, where they joined at least three other officers, including the jail supervisor, Officer Jerry Pedigo. Murphy again asked what crime he had committed. The officers did not tell him. Murphy argued with the officers about Schmitt's demand that he identify himself and continued to question why he was at the jail. Pedigo told Murphy, "In here you're not going to run your mouth to me, 'cuz I'll just as soon punch you in the

[3] Schmitt acknowledged that he did not smell alcohol on Murphy. Pet.App.38a ¶83, 42a ¶111; Video 37.12–37.18.

face and put you in that chair." Murphy asked Pedigo if he would really punch him in the face. Pedigo confirmed, "Absolutely. If you keep running your mouth to me." Schmitt soon explained that Murphy was at the jail because Schmitt had asked him numerous times to identify himself and Murphy refused. Around this time, Murphy talked back to Schmitt and answered Schmitt's series of questions by asking Schmitt the same ones back. Still, Murphy remained calm. Pet.App.39a ¶¶84–86, 92, 94, 40a ¶95; Video 38.57–49.07.

Eventually, the officers locked Murphy in a cell. Murphy did not resist. Schmitt told Pedigo, "I'm going to talk to the PA [Prosecuting Attorney], see what I can get on him." Officers called Murphy more degrading names and learned his name from a credit card in his wallet. Rather than release Murphy upon learning his identity, Schmitt said, "He can still sit here for being an asshole." Pet.App.37a ¶69, 42a ¶¶110, 114, 116; Video 49.07–56.32.

Schmitt later made a phone call for a record check on Murphy and said, "Please let there be a warrant." When the record came back clean, Schmitt said, "Damn." He said that Murphy would be on a 12-hour hold "until he decides to play nice," that Murphy "was just all full of insults and rude things to say all the way down here," and that "I didn't want him walking down my highway." Schmitt then left the jail. Pet.App.42a ¶¶117–120; Video 57.17–1.02.48.

Murphy remained locked in jail for about two hours. Officers then released him. He was never

charged with any crime based on the incident. Pet.App.43a ¶¶121–123.

Shortly after the incident was publicized, Pedigo was fired for his threats to punch Murphy in the face. Pet.App.41a ¶102. The county sheriff publicly apologized to Murphy and the public for the behavior seen in the video. See *'We're not hiding anything': Camden County Sheriff's Department official removed as video shows police interaction*, Springfield News-Leader (June 24, 2021), https://perma.cc/V6XK-KZQW ("It was wrong * * * I was furious. * * * Just like any profession, there are good cops and there are bad cops. I can't make any excuses for the type of behavior seen in the video. It was unacceptable and I apologize to the victim and to the people of Camden County.").

**B. Procedural history**

1. Murphy sued respondent Schmitt with a claim under 42 U.S.C. 1983. He alleged his arrest was in retaliation for exercising First Amendment rights.[4]

In his complaint, Murphy acknowledged that probable cause existed to believe he violated a Missouri statute providing that pedestrians shall "when practicable walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction" when a road lacks a sidewalk. Mo. Rev. Stat. § 300.405.2; Pet.App.36a ¶65. That is because Murphy was walking on the right side of the road when Schmitt stopped him.

[4] Murphy also asserted other claims—against Schmitt, Pedigo, and Camden County—that are no longer at issue.

But Murphy asserted that his claim fits the probable-cause exception of *Nieves*. Pet.App.45a ¶133, 47a ¶140. Under that exception, probable cause does not bar a retaliatory-arrest claim when the plaintiff presents objective evidence that similarly situated individuals not engaged in the same kind of protected speech were not arrested for the same conduct. *Nieves*, 139 S. Ct. at 1727.

Murphy alleged that "[w]alking on the wrong side of the road occurs all the time on the highways with wide shoulders, and the police rarely, if ever, arrest a person for walking on the wrong side of the road, but did arrest Murphy who just has been protesting police conduct." Pet.App.45a–46a ¶137; see also Pet.App.-28a ¶1 ("No one else has been arrested for walking with traffic."). He added that "[a] reasonable opportunity for further investigation or discovery will show that no one else in recent memory has been detained or arrested by any law enforcement officer[] in either Sunrise Beach or Camden County for walking on the wrong side of the road[.]" Pet.App.31a ¶21, 37a ¶68.

Supporting these allegations, Murphy provided a link to video footage of the incident captured by Schmitt's body camera. Pet.App.30a–31a ¶18. That footage shows (among other things) officers at the jail failing to come up with the walking offense as a basis for Murphy's arrest, the jail supervisor threatening to punch Murphy for talking, and Schmitt's own statements indicating that similarly situated individuals would not have been arrested and held in custody.

2. In the district court, Schmitt moved for dismissal based on qualified immunity. The district court

granted the motion, reasoning that (1) "Plaintiff needs a clearly established right to refuse to identify himself after he was lawfully detained for violating the law. No such clearly established right exists," Pet.App.20a, and (2) because the right not to identify oneself is unclear, Murphy could not avail himself of the *Nieves* probable-cause exception, Pet.App.23a.

3a. Murphy appealed to the Eighth Circuit, which affirmed the dismissal of his retaliation claim on different grounds. Murphy made two basic arguments on appeal. First, he argued that he had a clearly established First Amendment right not to identify himself on these facts. Pet. C.A. Br. 23–25, 28. Second, he argued that the *Nieves* probable-cause exception applies because walking on the wrong side of the road is akin to the jaywalking example in *Nieves*. *Id.* at 25–30, 37.[5]

The Eighth Circuit either implicitly concluded or assumed without deciding that Murphy's refusal to identify himself and his other statements to Schmitt were exercises of his protected First Amendment rights. Pet.App.4a–5a. In a split decision, the panel majority suggested that the *Nieves* probable-cause exception is dicta. Compare Pet.App.4a ("The Supreme Court *arguably reserved* one 'narrow qualification' to the general rule[.]" (emphasis added)), with *id.* at 10a n.3 (Grasz, J., dissenting) ("The *Nieves* exception is not dicta."). The majority then reasoned that even if the exception is not dicta, Murphy failed to supply enough objective evidence that similarly situated

[5] He also argued that his conduct was not evasive. Pet. C.A. Br. 30–32.

people are not arrested for walking on the wrong side of the road. Pet.App.5a–6a. Thus, in the majority's view, Murphy failed to satisfy the exception if it exists.

To reach this conclusion, the majority excluded from consideration "Murphy's assertion that '[a] reasonable opportunity for further investigation or discovery will show that no one else in recent memory has been detained or arrested by any law enforcement officers . . . for walking on the wrong side of the road[.]'" Pet.App.5a. In the majority's view, this allegation "does little to show officers typically witness violations of § 300.405 and exercise their discretion not to arrest." *Ibid.* Although the majority observed that "jaywalking and walking on the wrong side of the road are similar," *ibid.*, it determined that "[a]s a matter of experience and common sense the present allegations do not show violations of § 300.405 are so common as to be 'endemic' or are so frequently observed as to give rise to a 'reasonable inference' that officers 'typically exercise their discretion' not to arrest," Pet.App.6a (quoting *Nieves*, 139 S. Ct. at 1727).

The majority also excluded from consideration Schmitt's video-recorded statements at the jail—statements made about 30 minutes after Murphy was arrested. Pet.App.6a. The majority reasoned that "[a] particular officer's state of mind is simply 'irrelevant.'" *Ibid.* (quoting *Nieves*, 139 S. Ct. at 1725).

3b. Judge Grasz dissented. In his view, the *Nieves* probable-cause exception is not dicta, Pet.App.8a n.3, and "Murphy plausibly asserted that the Sunrise Beach Police Department does not regularly enforce

this law" against individuals walking on the wrong side of the road, Pet.App.7a. To start, Judge Grasz would not have disregarded Murphy's allegation that "no one else in recent memory has been detained or arrested by any law enforcement officers in either Sunrise Beach or Camden County for walking on the wrong side of the road." Pet.App.10a. That's because "most, if not all, of the 'objective evidence' about whether Sunrise Beach police officers commonly see people walking on the wrong side of the road, but typically exercise their discretion not to arrest, would not be in Murphy's possession *before* discovery." *Ibid.*

Judge Grasz also reasoned that "the allegations of post hoc decision-making indicate pretext, which supports application of the *Nieves* exception." Pet.App.12a. He believed the majority should have considered Schmitt's statements made at the jail, such as Schmitt describing Murphy as a "dip shit walking down the highway" who "would not identify himself" and who "ran his mouth off," and insisting that Murphy "sit here for being an asshole." Pet.App.9a. Those statements satisfied the *Nieves* exception when added to the facts that (1) Schmitt did not immediately give a reason for the arrest after about ten minutes of Murphy criticizing and challenging him; (2) Schmitt was scrambling to justify the arrest, saying falsely that Murphy was stumbling or drunk; and (3) Schmitt made a phone call, asking what he could charge Murphy with. *Ibid.* Indeed, Judge Grasz explained that the atypical nature of the arrest could be inferred from the fact that officers had such "trouble identifying [walking on the wrong side of the road] as the basis for the arrest." *Ibid.*

Finally, Judge Grasz concluded that the First Amendment right Schmitt violated was clearly established, because *Nieves* confirmed "that an individual has the right to be free from a retaliatory arrest, even if supported by probable cause, when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been arrested." Pet.App.11a.

4. The Eighth Circuit denied rehearing en banc in a divided vote, with Judges Kelly, Erickson, and Grasz voting in favor of rehearing en banc. Pet.App.1a.

## REASONS FOR GRANTING THE PETITION

This case presents two independent but related issues that satisfy this Court's certiorari criteria. On both issues the Eighth Circuit's decision conflicts with other circuits' approaches. Both issues are important to the adjudication of often recurring constitutional claims that seek to constrain government suppression of protected speech. The Court should grant certiorari to resolve them. At least, the Court should hold this petition until the Court decides *Gonzalez* v. *Trevino*, No. 22-1025, and if the Court in *Gonzalez* addresses either of the questions presented here, the Court should grant, vacate, and remand the case to the Eighth Circuit for reconsideration in light of *Gonzalez*.

## I. This Court should resolve (and may resolve in *Gonzalez* v. *Trevino*, No. 22-1025) whether the *Nieves* probable-cause exception allows courts to consider allegations that no one else has been arrested for the same crime.

Arrests made in retaliation for protected speech violate the First Amendment regardless of probable cause. *Nieves*, 139 S. Ct. at 1727. Still, an arrestee generally cannot bring a Section 1983 claim against a police officer for a retaliatory arrest when probable cause supports the arrest. *Ibid.* There is an exception, though, "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Ibid.* In those cases "an unyielding requirement to show the absence of probable cause could pose 'a risk that some police officers may exploit the arrest power as a means of suppressing speech.'" *Ibid.* (quoting *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945, 1953–1954 (2018)). So, the no-probable-cause requirement does not apply "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Ibid.*

The Court in *Nieves* gave jaywalking as an example. 139 S. Ct. at 1727. "If an individual who has been vocally complaining about police conduct is arrested for jaywalking," it is not at all clear that the arrest would have happened without retaliatory animus. *Ibid.* Thus, dismissing a retaliation claim like that "would seem insufficiently protective of First Amendment rights." *Ibid.* The probable-cause exception

allows these claims to proceed despite probable cause when the plaintiff makes the required showing.

This Court has not yet addressed whether, for purposes of this exception, courts may consider a plaintiff's allegations that no one else has been arrested for the same conduct. The Court may address this question soon, in *Gonzalez*. There, as here, the petitioner alleged that no one else in the county had been arrested for the same conduct. See *Gonzalez* v. *Trevino*, 42 F.4th 487, 492 (CA5 2022). And as here, the circuit court decided that such an allegation must be disregarded when evaluating the *Nieves* probable-cause exception. *Id.* at 492–493.

If this Court does not resolve this question in *Gonzalez*—for example, by holding that *Nieves* is limited to on-the-spot arrests by police officers—it should do so here.[6] The federal circuits are in an acknowledged conflict on this issue. And excluding allegations that no one else has been arrested for the same conduct would often enable government officials to abuse the arrest power to suppress their critics with impunity.

### A. The circuits are split.

The circuits are admittedly split over whether a court may consider allegations that no one else has been arrested for the same conduct. The Seventh and Ninth Circuits do not exclude these allegations from consideration. The Fifth and Eighth Circuits do.

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[6] This Court in *Gonzalez* may answer both questions presented here.

The Ninth Circuit in *Ballentine* v. *Tucker* considered the absence of any other arrests for the same conduct. There, activists were arrested after chalking anti-police messages on Las Vegas sidewalks. 28 F.4th 54, 60 (CA9 2022). They sued, arguing that their arrests were retaliatory, and the Ninth Circuit allowed their claims to proceed. The court reasoned in part that the police could point to no example of the police department ever arresting anyone besides the plaintiffs for chalking on the sidewalk. *Id.* at 62. The court explained that "[t]his is the kind of 'objective evidence' required by the *Nieves* exception to show that a plaintiff was 'arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.'" *Ibid.* (quoting *Nieves*, 139 S. Ct. at 1727).

The Seventh Circuit has similarly taken the view that when deciding what allegations may be considered, "common sense must prevail." *Lund* v. *City of Rockford*, 956 F.3d 938, 945 (CA7 2020). The Court explained that it "cannot * * * predict in advance every factual scenario which might meet the [*Nieves*] 'objective evidence' standard," *ibid.*, and that "a plaintiff might prevail by pointing to similarly-situated comparators, statements from arresting officers or other police officials, or a wide range of other 'objective evidence' of retaliation," *Lyberger* v. *Snider*, 42 F.4th 807, 813–814 (CA7 2022). Under the Seventh Circuit's approach, allegations that no one has been arrested for the same conduct may support a commonsense inference that similarly situated individuals have not been arrested for doing the same thing. Cf. *Kansas* v. *Glover*, 589 U.S. 376, 381 (2020) (recognizing a "commonsense inference" that the driver of a

vehicle is likely the registered owner). This is particularly true when, as here, an offense has been on the books for a while and the conduct is not unusual.

Had the Ninth and Seventh Circuits' "commonsensical[]" interpretation of the *Nieves* exception been applied here, probable cause would not have barred Murphy's retaliatory-arrest claim. Murphy alleged that:

- No one else has been arrested for walking with traffic, which "occurs all the time on the highways with wide shoulders." Pet.App.28a ¶1, 31a ¶21, 37a ¶68, 45a–46a ¶137.

- Schmitt struggled to justify the arrest and called the now-Police Chief for help identifying an offense with which to charge or hold Murphy. Pet.App.38a ¶¶79–83, 41a ¶¶104–108, 42a ¶117.

- Schmitt did not arrest Murphy right away upon seeing him walking on the wrong side of the street; he arrested him only after nine minutes of Murphy exercising his First Amendment rights. Pet.App.34a ¶42.

- The jail supervisor threatened to punch Murphy in retaliation for his speech. Pet.App.39a ¶¶92–94, 40a ¶¶95–96.

- At the jail, Schmitt said that he arrested Murphy because Murphy wouldn't identify himself and that Murphy could sit in jail "for being an asshole." Pet.App.38a ¶81, 42a ¶116.

- Murphy was held in jail for two hours rather than being released once he was identified. Pet.App.42a ¶114, 43a ¶121.

Walking on the wrong side of a road is not unusual conduct, and Missouri's prohibition on walking in the same direction as vehicle traffic was not new when Schmitt arrested Murphy—it has been on the books since 1965. See 1965 Mo. Laws 461. Yet multiple officers could not identify this offense as justification for Murphy's arrest.[7] So the allegation that no one else has been arrested for the same conduct supports a commonsense inference that similarly situated individuals have not been arrested.

In the Eighth Circuit, Murphy's allegations that no one else has been arrested for the same conduct could not move the needle at all. The panel majority (over Judge Grasz's dissent) classified those allegations as "threadbare recitals of a cause of action's elements, supported by mere conclusory statements" that are not taken as true when evaluating the complaint's sufficiency. Pet.App.6a. That's because, according to the majority, the allegations "do not show violations of § 300.405 are so common as to be 'endemic' or are so frequently observed as to give rise to a 'reasonable inference' that officers 'typically exercise their discretion' not to arrest." *Ibid.*

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[7] See also Pet.App.9a (Grasz, J., dissenting) ("If the Sunrise Beach Police Department regularly enforces the Missouri statute prohibiting a person from walking on the wrong side of the road, one would suspect Officer Schmitt and the other officers he spoke with would have had little trouble identifying that law as the basis for the arrest.").

The Fifth Circuit also disregards allegations that no one else has been arrested for the same conduct. In *Gonzalez* v. *Trevino*, 42 F.4th 487 (CA5 2022), cert. granted, 144 S. Ct. 325 (2023) (No. 22-1025), a panel majority felt "bound" to exclude from consideration the plaintiff's allegation that no one in the same county had been arrested for the same conduct in the past decade. *Id.* at 492, 494. In the majority's view, only examples of non-arrests can satisfy the probable-cause exception. *Id.* at 492. The majority recognized that it was splitting from the Seventh Circuit, which "has taken a broader view of the *Nieves* exception." *Id.* at 492–493.

This Court heard argument in *Gonzalez* on March 20, 2024.

### B. The decision below is wrong.

The Eighth and Fifth Circuits' exclusion of allegations that no one else has been arrested for the same conduct has two main problems stemming from common sense and practical realities of litigation.

First, excluding these allegations defies common sense. As explained by Judge Oldham and the Solicitor General's Office in *Gonzalez*, "[e]vidence that an arrest has never happened before (*i.e.*, a negative assertion) can support the proposition that there are instances where similarly situated individuals not engaged in the same protected activity hadn't been arrested (*i.e.*, a positive inference). Context determines whether a negative assertion amounts to positive evidence." 42 F.4th at 505–506 (citations omitted); accord Solicitor General's Brief in *Gonzalez* v. *Trevino*,

No. 22-1025 [hereinafter "SG's *Gonzalez* Br."] at 18; see also *Negative Evidence*, Black's Law Dictionary (11th ed. 2019) ("[A] negative assertion will sometimes be considered positive evidence[.]"). That is what the "objective evidence" inquiry demands: alleged evidence that the plaintiff "was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1727.

In *Gonzalez*, Judge Oldham reasoned, "common sense dictates that [the plaintiff's] negative assertion amounts to direct evidence that similarly situated individuals not engaged in the same sort of protected activity had not been arrested" because the statute under which the plaintiff was arrested was broad, covering activity that likely occurs dozens to thousands of times every couple of years. *Gonzalez*, 42 F.4th at 505–506 (Oldham, J., dissenting).[8]

To be sure, an allegation that no one has been arrested for the same conduct will not *always* support an inference that officers typically choose not to arrest people for that conduct. For example, if the state legislature passes a law criminalizing previously legal conduct, a plaintiff arrested for that conduct the next week will have trouble convincing a court that officers usually do not arrest people under the new statute for

[8] In the Fifth Circuit, Judge Ho wrote an opinion dissenting from the denial of rehearing en banc. Judge Ho would have held that by presenting allegations that "no one has ever been arrested for doing what she did," the plaintiff met her burden to show "that [the defendants] decided to arrest her, even though they usually exercise their discretion not to make such arrests." *Gonzalez* v. *Trevino*, 60 F.4th 906, 910 (CA5 2023).

the same conduct (assuming the law was not enacted to target speakers). The same is true for a plaintiff arrested after engaging in unusual criminal conduct—like trying to buy a child from a mother at Walmart,[9] putting razor blades in pizza dough,[10] or throwing an alligator onto the roof of a building.[11] If there is no reason to believe anyone else has engaged in the same conduct before, a court need not give any weight at all to a plaintiff's allegation that no one else has been arrested for that conduct. See SG's *Gonzalez* Br. at 20 ("[I]f the plaintiff's particular conduct is itself unprecedented or uncommon, the absence of prior similar arrests will show little, if anything.").

But courts should be allowed to consider the allegation and assess its persuasiveness with all the other alleged facts. Under the Eighth and Fifth Circuits' views, courts must exclude even allegations that "jaywalking here happens all the time and no one in recent memory has been arrested for it." Yet that would eliminate the hypothetical jaywalker this Court used as an example of a plaintiff who could state a retaliatory-arrest claim. See *Nieves*, 139 S. Ct.

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[9] See Marlene Lenthang, *Texas Woman Arrested After Allegedly Trying to Buy Another Woman's Child for $500,000 at Walmart*, NBC News (Jan. 24, 2022), https://perma.cc/D44M-XG8G.

[10] See Neil Vigdor, *Man Who Planted Razor Blades in Pizza Dough Gets 5 Years in Prison*, N.Y. Times (Dec. 2, 2021), https://www.nytimes.com/2021/12/02/us/pizza-dough-razor-blades-sentencing.html.

[11] See Charles Hilu, *Florida Man Tries to Throw Alligator onto Roof to Teach it a 'Lesson': Police*, Wash. Exam'r (July 17, 2021), https://perma.cc/JAJ6-XX84.

at 1727; *Gonzalez*, 42 F.4th at 503 (Oldham, J., dissenting).

Second, excluding allegations that no one else has been arrested for the same conduct ignores the realities of pre-discovery pleading. As Judge Grasz explained below, "most, if not all, of the 'objective evidence' about whether Sunrise Beach police officers commonly see people walking on the wrong side of the road, but typically exercise their discretion not to arrest, would not be in Murphy's possession *before* discovery." Pet.App.10a (Grasz, J., dissenting). So pleading on information and belief—which is what Murphy's allegations amount to—"must be permitted" in this circumstance. *Ahern Rentals, Inc.* v. *EquipmentShare.com, Inc.*, 59 F.4th 948, 954 (CA8 2023). Indeed, the circuits have largely agreed that "where 'the facts are peculiarly within the possession and control of the defendant,'" courts should not summarily reject factual allegations pled on information and belief. *Ibid.* (citing cases). Plaintiffs often will be unable to access public records of non-arrests, because those records usually don't exist. Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 Nw. U. L. Rev. 987, 1023–1024 (2021); cf. *Thompson* v. *Clark*, 596 U.S. 36, 48 (2022) (explaining that "the individual's ability to seek redress for a wrongful prosecution cannot reasonably turn on the fortuity of whether the prosecutor or court happened to explain why the charges were dismissed").

This doesn't mean any allegation goes. Rule 11 specifies that an attorney or unrepresented party who gives the court a pleading "certifies * * * to the best of

the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b). A court may impose sanctions for violations. Fed. R. Civ. P. 11(c).[12]

And just because a complaint survives a motion to dismiss does not mean full-blown discovery is a must. Courts may prevent "undue burden or expense" on a party or person by exercising their authority under Rule 26(c) and (d) to limit the timing, sequence, frequency, and extent of discovery. See *Crawford-El* v. *Britton*, 523 U.S. 574, 597–600 (1998).

But excluding all allegations that no one else has been arrested for the same conduct is "insufficiently protective of First Amendment rights." *Nieves*, 139 S. Ct. at 1727. It "pose[s] a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Ibid.* (cleaned up).

### C. The issue is important.

This is a recurring federal issue of national importance. It overlaps with a question presented in *Gonzalez*, No. 22-1025. And it concerns whether government actors who abuse the arrest power in retaliation for a person's protected speech can be held

[12] Also, if the factual allegations are "so vague or ambiguous that [a defendant] cannot reasonably prepare a response," the defendant may move for a more definite statement. Fed. R. Civ. P. 12(e).

accountable under Section 1983 for violating the Constitution. Indeed, the question concerns whether plaintiffs have a cause of action against officers who violated their First Amendment rights. The Eighth and Fifth Circuit's approach makes it impossible—in many meritorious cases—for plaintiffs to state a retaliation claim.

With more than 5,000 federal crimes, plus each state's criminal statutes, the risk of retaliatory arrests "has never been more prevalent than today." *Gonzalez*, 60 F.4th at 907 (Ho, J., dissenting from denial of en banc review). After all, probable cause for "even a very minor criminal offense" may justify an arrest. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001); see *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part) ("In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."). And yet plaintiffs with meritorious retaliation claims may be unable to supply more—at the pleading stage—than body camera footage of the arrest and allegations on information and belief that no one else has been arrested for the same conduct.

The Eighth and Fifth Circuit's approach to the *Nieves* probable-cause exception thus invites government officials to do precisely what then-Attorney General Robert Jackson warned of in 1940: "With the law books filled with a great assortment of crimes," there is a "fair chance of finding at least a technical violation of some act on the part of almost everyone," enabling officers to "pick[] the man and then search[] the

lawbooks." Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc'y 18, 19 (1940).

### D. This is an excellent vehicle.

Murphy argued at every stage that his allegations satisfy the *Nieves* probable-cause exception. And the Eighth Circuit isolated this issue as a basis for its decision.

In the district court, the parties argued about additional questions, such as whether Murphy's refusal to identify himself was protected by the First Amendment or whether it was instead a lawful basis for his arrest. Pet. D.Ct. Br. 10; Resp. D.Ct. Op.Br. 7–8. The district court opined on this issue, concluding that Murphy did not have a clearly established First Amendment right to refuse to identify himself and that there was probable cause to believe Murphy violated a statute for "knowingly fail[ing] or refus[ing] to comply with any lawful order or direction of a police officer." Mo. Rev. Stat. § 300.080; see Pet.App.22a–23a.

On appeal, the parties again disputed the lawfulness of Schmitt's order that Murphy identify himself. Pet. C.A. Br. 13–14, 23–25; Resp. C.A. Br. 11. But unlike the district court, the Eighth Circuit did *not* decide that there was probable cause to believe Murphy violated the statute prohibiting a person from "knowingly fail[ing] or refus[ing] to comply with any lawful order or direction of a police officer." Mo. Rev. Stat. § 300.080. The court instead recognized probable cause only for violating the statute about walking against traffic. Pet.App.4a–5a.

The Eighth Circuit then either implicitly decided or assumed without deciding that Murphy's arguments with Schmitt about identifying himself and his refusal to identify himself were protected First Amendment activity. Pet.App.4a–5a. The sole basis for the Court's decision was that Murphy's allegations did not satisfy the *Nieves* probable-cause exception because no consideration would be given to Murphy's allegations that (1) no one else has been arrested for walking on the wrong side of the road and (2) the arresting officer said certain things at the jail. Pet.App.5a–6a.

As a result, whether Murphy's refusal to identify himself was a legitimate basis for his arrest is not at issue now. If this Court vacates and remands, the issue may arise again on remand. But this Court need not and should not address it when the Eighth Circuit did not.

Likewise, the Eighth Circuit did not address whether Murphy may have stated a retaliation claim based on his continued detention (after the initial arrest) or whether Murphy has overcome qualified immunity. These, too, may be issues on remand, but they are not at issue now because the panel majority did not pass on them. So this appeal cleanly presents as dispositive whether a court may consider allegations that no one else has been arrested for the same conduct.

## II. This Court should resolve whether the *Nieves* probable-cause exception allows courts to consider an arresting officer's statements made after an arrest.

The second issue presented independently warrants review. Courts are in a conflict over whether an arresting officer's statements made after an arrest may be considered for purposes of the *Nieves* probable-cause exception.

When creating the probable-cause exception, the Court in *Nieves* stated that "the statements and motivations of the particular arresting officer are 'irrelevant' at this stage." 139 S. Ct. at 1727. That is because the probable-cause rule seeks to avoid probing officers' "'split-second judgments' when deciding whether to arrest" and forcing them to second-guess statements they make when communicating with suspects then. *Id.* at 1724. Of course, that concern does not exist when the arrest has already happened. And officers' own statements are often highly probative of whether an arrest would have happened without the protected speech. See *id.* at 1734 (Gorsuch, J., concurring in part) (observing that some circuit courts understand officers' statements as "equally if not more probative" than comparative data about similarly situated individuals).

The Court in *Nieves* also cited *United States* v. *Armstrong* when crafting the probable-cause exception. *Nieves*, 139 S. Ct. at 1727. *Armstrong* held that a person claiming he was prosecuted because of his race "must show that similarly situated individuals of a different race were not prosecuted." 517 U.S. 456,

465 (1996). But this Court did not elaborate on the extent to which *Nieves* incorporated *Armstrong*'s similarly situated standard, if at all. And *Armstrong* expressly left open the possibility that admissions might allow a claim to proceed. *Id.* at 469 n.3.

If the Court does not answer in *Gonzalez* whether courts may consider arresting officers' post-arrest statements, the Court should provide guidance here, by explaining that courts may consider them.

### A. The circuits are split.

The Seventh Circuit allows consideration of arresting officers' post-arrest statements.[13] The Eighth and Fifth Circuits do not.

The Seventh Circuit in *Lund* v. *City of Rockford* considered arresting officers' deposition statements when deciding whether the plaintiff met the *Nieves* probable-cause exception. 956 F.3d 938, 946–947 (CA7 2020). In that case, the plaintiff claimed that the officers' statements alone established that his expressive activity was a but-for cause of his arrest. He argued that the officers admitted they arrested him "based solely on his news gathering activities." *Id.* at

[13] The Seventh Circuit also views *Armstrong* as limited, at least in large part, to prosecutorial decisions. See *United States* v. *Davis*, 793 F.3d 712, 720–721 (CA7 2015) (en banc). The Third, Ninth, and Tenth Circuits hold similar views. See *United States* v. *Washington*, 869 F.3d 193, 219 (CA3 2017); *United States* v. *Sellers*, 906 F.3d 848, 856 (CA9 2018); *Marshall* v. *Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1168 (CA10 2003) (concluding that a plaintiff's challenge to the specific acts of a police officer is "more susceptible to traditional modes of proof" than claims to which *Armstrong* applies).

946. The court considered the officers' statements and concluded that the statements showed the opposite of what the plaintiff claimed—not that he was arrested solely for his First Amendment activity but because he was obstructing an investigation. *Id.* at 946–947. Since *Lund*, the Seventh Circuit has reiterated that "a plaintiff might prevail by pointing to * * * statements from arresting officers or other police officials[.]" *Lyberger* v. *Snider*, 42 F.4th 807, 813–814 (CA7 2022); cf. *Ballentine* v. *Tucker*, 28 F.4th 54, 63 (CA9 2022) (considering arresting officer's statements in a declaration of arrest, which "explicitly included Plaintiffs' association with anti-police groups and the critical content of their messages").

By contrast, the Fifth and Eighth Circuits disregard arresting officers' statements made after an arrest.

The Fifth Circuit in *Gonzalez* concluded that only examples of non-arrests can satisfy the probable-cause exception; nothing else may be considered. 42 F.4th at 492.

And in the Eighth Circuit below, the panel majority excluded from consideration Murphy's allegations of Schmitt's statements at the jail—after he arrested Murphy and transported him there. These allegations included the video recording of Schmitt:

- Calling the now-Police Chief to ask what he could charge Murphy with or hold him on, Video 35.46–36.23;

- Explaining that he had brought Murphy to the jail because Murphy was "refusing to identify himself,"[14] Video 34.44–36.22;

- Telling fellow officers that Schmitt was "going to talk to the PA [Prosecuting Attorney], see what I can get on him," Video 49.36–49.41;

- Saying, "Please let there be a warrant" when calling for a record check on Murphy, and saying "damn" upon learning that the record was clean, Video 58.23–58.34; and

- Telling officers that Murphy "was just all full of insults and rude things to say all the way down here" and "can still sit here for being an asshole," Video 56.20–56.30, 01.00.49–01.01.06.

Under the Seventh Circuit's approach, these statements could be considered and would satisfy the probable-cause exception when added to Murphy's other allegations of disparate treatment. See *supra*, Part I.A.

### B. The decision below is wrong.

Disregarding arresting officers' statements made after the arrest conflicts with *Nieves*'s reasoning, defies common sense, and would bar some of the strongest retaliation claims.

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[14] Again, for purposes of this petition, we assume Murphy's refusal to identify himself was protected First Amendment activity. See *supra* Part I.D.

In *Nieves*, the Court mentioned that "statements of arresting officers are irrelevant at this stage" without articulating how far this rule goes. Does it mean an officer's statement, "I would not have arrested him without his speech," made a year after the arrest must be disregarded? What about an officer's statement, "I usually don't arrest people for walking on the wrong side of the street, but this guy was saying things I don't like, so I arrested him" made in the evening, after arresting the plaintiff in the morning?

*Nieves*'s reasoning suggests that these statements may (and should) be considered. The probable-cause rule was largely driven by a concern that courts not interfere with police officers' "dangerous task" of making arrests every day—a task "that requires making quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving.'" 139 S. Ct. at 1725. The Court sought to allow police officers to "go about their work without undue apprehension of being sued." *Ibid.* With this concern, it makes sense to disregard an officer's statements that are contemporaneous with an arrest. When making an arrest, officers "frequently must make 'split-second judgments,'" and may need to communicate freely with the suspect and others to perform their duties as safely as they can. *Id.* at 1724.

But that reasoning does not apply when the arrest is complete. Here, Schmitt was not making any "split-second judgments" about whether to arrest or performing a "dangerous task" of an arrest when he phoned a friend and talked with other officers at the jail. Murphy was secured in handcuffs in a patrol vehicle and then secured in the jail. And Schmitt's

statements were all captured on a video recording. This contrasts with the situation in *Nieves*, where the plaintiff offered nothing but his own statement that the arresting officer said, "Bet you wish you would have talked to me now" virtually contemporaneously with the arrest, before the plaintiff was taken to a holding tent at the site where he was arrested. 139 S. Ct. at 1721.

It is also important to recognize that statements by arresting officers are often "objective evidence" because they go beyond subjective motive and are probative of the key objective inquiry: whether similarly situated people would have been treated differently. For example, an arresting officer's statement in a police report that "we usually don't arrest people for this minor offense" or "I see people do this frequently, but this is the only time I've ever arrested someone for it because he was running his mouth" is evidence—perhaps the best evidence—that similarly situated people were not arrested for the same conduct.[15]

Two other competing concerns the Court identified in *Nieves* suggest that courts should be allowed to consider officers' post-arrest statements. The first is "a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Nieves*, 139

[15] Similarly, "objective evidence" lies in the facts that an officer talked with others to figure out what offense supports an arrest, and that an officer lied about what happened (for example, here Schmitt lying about Murphy stumbling or showing other signs of drunkenness). Cf. SG's *Gonzalez* Br. at 22 (arguing that courts should be able to consider "evidence that the officers made false statements when documenting the arrest"). Those facts are not an arresting officer's statements at all, though they involve statements the officer made.

S. Ct. at 1727. The second is the risk of unmeritorious claims based only on allegations of an officer's "state of mind," which "is 'easy to allege and hard to disprove.'" *Id.* at 1725; see also *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018).

With claims like Murphy's, the first concern is a serious problem, while the second concern is not an issue. Schmitt's statements at the jail strongly point toward retaliation as a but-for cause of Murphy's arrest. At the same time, the statements are not mere allegations of an officer's state of mind. They are (1) a question to someone on a telephone, indicating that arrests for walking on the wrong side of the street never happen or are exceedingly rare; and (2) after-the-fact admissions that the officer arrested Murphy because of his expressive conduct. What's more, Murphy provided these statements on a video recording, so their veracity is beyond question. Contra *Nieves*, 139 S. Ct. at 1721.

Finally, the Court's citation to *Armstrong* is instructive. See *Nieves*, 139 S. Ct. at 1727. That's because *Armstrong* expressly left open the possibility that admissions may be considered in the selective-prosecution context. 517 U.S. at 469 n.3. This makes sense, as an admission is highly probative evidence—perhaps the most direct and most probative evidence—that a person was treated worse for an impermissible reason. See, *e.g.*, *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 584 U.S. 617, 634–637 (2018); *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 540–542 (1993). So an officer's statements made after an arrest may be the best evidence that similarly situated individuals would not

have been arrested. (Of course, as the Seventh Circuit's experience shows, just because a court considers an officer's post-arrest statements does not mean the plaintiff satisfies the probable-cause exception. See *Lund*, 956 F.3d at 946–947.)

The upshot is that if *Nieves* incorporated *Armstrong*'s standard, *Nieves* did not exclude *all* statements by an arresting officer. Indeed, excluding all statements by an arresting officer—no matter when the statements were made—would bar some of the strongest retaliatory-arrest claims, like those in which a plaintiff has a recorded admission by an arresting officer. Instead, the best reading of *Nieves* is that the exclusion of officers' statements is limited to statements made before and contemporaneously with the arrest.

### C. The issue is important.

Lower courts will confront this question often. With the ubiquity of cameras and other recording devices, plaintiffs like Murphy may more-than-plausibly allege officers' statements made after an arrest. Nine out of ten people in the United States have a smartphone.[16] As of 2016, more than 80% of general law-enforcement agencies in the United States used recording devices, and nearly half used body-worn cameras.[17] And security-camera systems are commonplace for homes and businesses. Courts will be

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[16] See Pew Research Center, *Mobile Fact Sheet* (Jan. 31, 2024), https://perma.cc/9PQL-HPTL.

[17] See Shelley S. Hyland, *Body-Worn Cameras in Law Enforcement Agencies, 2016*, U.S. Department of Justice (Nov. 2018), https://perma.cc/NV9V-LE32.

presented with footage, as here, of a police officer making statements after an arrest indicating that officers do not arrest similarly situated people who do not engage in similar speech. Courts need to know whether they must turn a blind eye to such probative evidence of differential treatment. *Nieves*'s reasoning suggests the answer is that courts need not turn a blind eye, but *Nieves* was unclear, which is why a circuit split exists.

Because arresting officers' post-arrest statements can be so probative, meritorious claims will be barred in the Fifth and Eighth Circuits that would proceed in the Seventh. In other words, in the Fifth and Eighth Circuits, officers have greater incentive to blatantly and even admittedly abuse the arrest power to suppress their critics with impunity. Indeed, in those circuits, it is not enough for a plaintiff to present video footage of a police officer—on TV weeks after an arrest—saying that he arrested a man only because he criticized the police. Simply put, "there is no good reason to bar at the outset a claim with such strong objective evidence of a retaliatory motive." SG's *Gonzalez* Br. at 22.

### D. This is an excellent vehicle.

This question was preserved and was a basis for the Eighth Circuit's decision. Murphy urged the court to consider the statements Schmitt made on the video recording while at the jail. Petr. C.A. Br. 6–9. The majority refused to consider them. Pet.App.6a. Judge Grasz disagreed and arrived at a different outcome. Pet.App.9a.

An answer to this question determines whether vacatur is appropriate. The Eighth Circuit's decision rested on the majority's belief that it could not consider Murphy's allegations that no one else had been arrested for the same conduct and that Schmitt said certain things at the jail after the arrest. The ruling is thus unencumbered by any other holdings, like one about clearly established law. Cf. *supra*, Part I.D.

Under the Seventh Circuit's view, Murphy would satisfy the *Nieves* probable-cause exception. Schmitt's statements at the jail are strong evidence that officers typically do not arrest people for walking on the wrong side of the street. Schmitt asked, "What can I get him on?" meaning "What can I charge him with or hold him on?" and said he was "going to talk to the [Prosecuting Attorney], see what I can get on him." Video 35.46–36.23, 49.36–49.41. Schmitt also gave an admission, contra *Lund*, 956 F.3d at 946–947, that he brought Murphy to the jail because Murphy was "refusing to identify himself." Video 34.44–36.22. And after Murphy was identified, he said Murphy "can still sit here for being an asshole," "was just all full of insults and rude things to say all the way down here," and would be on a 12-hour hold "until he decides to play nice." Video 56.20–56.30, 59.56–01.00.04, 01.00.49–01.01.06. And as explained above (Part I.A.), these statements add to other alleged evidence suggesting differential treatment.

A strong claim like Murphy's should not be tossed out simply because Murphy was walking in Missouri instead of Illinois.

## CONCLUSION

The petition should be held pending this Court's decision in *Gonzalez* v. *Trevino*, No. 22-1025. If the Court's decision in *Gonzalez* bears on either question presented here, the petition should be granted and the opinion vacated and remanded for reconsideration in light of *Gonzalez*. Otherwise, the petition should be granted.

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MAY 10, 2024