

No. 23-1228

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

**SUPPLEMENTAL BRIEF
IN SUPPORT OF CERTIORARI**

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TABLE OF CONTENTS

	Page
Supplemental Brief in Support of Certiorari.....	1
Conclusion	5

TABLE OF AUTHORITIES

	Page
CASES	
<i>Gonzalez v. Trevino</i> , No. 22-1025, slip op. (June 20, 2024).....	1–4
<i>Nieves v. Bartlett</i> , 587 U.S. 391 (2019).	1, 4
STATUTES	
1965 Mo. Laws 461.....	2
42 U.S.C. 1983.....	1

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Petitioner Mason Murphy files this supplemental brief to explain how this Court’s recent decision in *Gonzalez v. Trevino*, No. 22-1025 (per curiam) (issued June 20, 2024), warrants at least a GVR ruling here.

Both *Gonzalez* and Murphy’s petition concern a retaliatory-arrest claim under 42 U.S.C. 1983. Murphy’s petition raises two questions about what sorts of evidence may be considered for the *Nieves* probable-cause exception¹:

1. May courts consider allegations that no one else has been arrested for the same crime?
2. May courts consider an arresting officer’s statements made after an arrest?

Cert.Pet. at i.

This Court in *Gonzalez* answered what sorts of evidence courts may consider for the *Nieves* exception: “The only express limit * * * on the sort of evidence a plaintiff may present for that purpose is that it must be objective * * *.” *Gonzalez*, slip op. at 4 (per

¹ Under the *Nieves* probable-cause exception, “[t]he existence of probable cause does not defeat a plaintiff’s claim if he produces ‘objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.’” *Gonzalez*, slip op. at 1 (per curiam) (quoting *Nieves v. Bartlett*, 587 U.S. 391, 407 (2019)). The exception “account[s] for ‘circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.’” *Id.* at 4 (quoting *Nieves*, 587 U.S. at 406).

curiam). As a result, the Court vacated the Fifth Circuit's judgment, which stood on a rule "that plaintiffs must use specific comparator evidence to demonstrate that they fall within the *Nieves* exception." *Ibid.*

Particularly relevant for Murphy's first question presented (whether courts may consider allegations that no one else has been arrested for the same crime), this Court in *Gonzalez* explained,

the fact that no one has ever been arrested for engaging in a certain kind of conduct—especially when the criminal prohibition is longstanding and the conduct at issue is not novel—makes it more likely that an officer *has* declined to arrest someone for engaging in such conduct in the past.

Gonzalez, slip op. at 5 (per curiam); cf. Cert.Pet. at 16–17 (“[A]llegations 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. * * * This is particularly true when, as here, an offense has been on the books for a while and the conduct is not unusual.”).

Here, Murphy was arrested for walking on the wrong side of a rural road, a longstanding crime involving commonplace conduct. See 1965 Mo. Laws 461. Murphy alleged on information and belief 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[.]” Pet.App.45a ¶137; 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. Murphy backed up these allegations with video footage of officers struggling to even identify walking on the wrong side of the road as a justification for Murphy’s arrest. Pet.App.30a–31a; see 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.”).

Under *Gonzalez*, then, the Eighth Circuit panel majority was wrong to exclude from consideration Murphy’s allegations that no one else in the county has been arrested for walking on the wrong side of the road. Those allegations—supported by video evidence—“make[] it more likely that an officer *has* declined to arrest someone for engaging in such conduct in the past.” *Gonzalez*, slip op. at 5 (per curiam). This error alone warrants a GVR ruling.

A GVR ruling is doubly appropriate because the panel majority also wrongly excluded all post-arrest statements by the arresting officer, including

statements that were video recorded.² For example, at the jail, the officer called the now-Police Chief to ask what he could charge Murphy with or hold him on, Video 35.46–36.23, and later the officer said he was “going to talk to the PA [Prosecuting Attorney], see what I can get on him,” Video 49.36–49.41. As Murphy explains in his petition, those statements are objective evidence that officers typically exercise their discretion not to arrest people for walking on the wrong side of the road. Cert.Pet. at 32 & n.15. That’s because the statements go beyond subjective motive and are probative of the key “objective inquiry”: whether similarly situated people would have been treated differently. See *Nieves*, 587 U.S. 391, 407 (2019). Under *Gonzalez*, all objective evidence must be considered. *Gonzalez*, slip op. at 4–5 (per curiam).

The video-recorded statements also reveal that the arresting officer’s description of Murphy as appearing drunk does not match the video (which shows the opposite) and that officers talked with each other to try to figure out what charge could support Murphy’s arrest; both are forms of objective evidence that Murphy “was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” *Gonzalez*, slip op. at 1 (per curiam) (quoting *Nieves*, 587 U.S. at 407). So the statements are “a permissible type of evidence” for purposes of the *Nieves* exception. *Id.* at 5.

The Eighth Circuit panel majority decided that Murphy failed to satisfy the *Nieves* exception based

² The video is linked in the complaint and in Murphy’s petition: <https://www.youtube.com/watch?v=ZhdaU4q22fY>. We cite the video here using “Video min.sec.”

on the majority's refusal to consider objective evidence that officers have not arrested similarly situated people for walking on the wrong side of the road. Under *Gonzalez*, that limit on the sort of evidence Murphy may present was mistaken.

CONCLUSION

Murphy's petition should be granted and the opinion vacated and remanded for reconsideration in light of *Gonzalez*. Otherwise, the petition should be granted.

Respectfully submitted,

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