

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

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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**COUNTERSTATEMENT OF QUESTIONS
PRESENTED**

This case rests solely on a pleading issue. The Eighth Circuit correctly found that Petitioner failed to sufficiently plead the *Nieves* exception, as the supposed “evidence” presented by Petitioner was nothing more than vague and conclusory statements that amounted to a threadbare recital of the elements of the *Nieves* exception, and accordingly dismissed Petitioner’s Complaint. Therefore, the question presented is whether the Eighth Circuit Court of Appeals correctly affirmed the district court’s Rule 12(b)(6) dismissal of Petitioner’s retaliatory arrest claim for failing to state a cause of action.

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INTRODUCTION

Petitioner, Mason Murphy, admits in his Complaint that Respondent, Officer Michael Schmitt, had probable cause to arrest Petitioner. Petition for Writ of Certiorari, at ii. Therefore, the only question is whether Petitioner's case fits into the narrow exception established in *Nieves* by presenting sufficient objective evidence that Petitioner was arrested for a crime when officers frequently have probable cause to arrest for the same crime but exercise their discretion not to.

The Eighth Circuit found that Petitioner failed to provide sufficient objective evidence to fall within the narrow exception established in *Nieves*. *Murphy v. Schmitt*, No. 22-1726, 2023 WL 5748752 at *2 (8th Cir. 2023); Pet.App.6a. Petitioner asserts that the Eighth Circuit reached this conclusion because they failed to consider his allegation that no one had been arrested for the same crime he had and failed to consider the arresting officer's post-arrest statements. Petition for Writ of Certiorari at 19-20, 30-31.

Petitioner's assertion that the Eighth Circuit failed to consider his allegation that no one had been arrested for the same crime as him in recent memory is simply untrue. The Eighth Circuit's opinion makes it clear that they considered Petitioner's allegation but found it lacking and insufficient to satisfy the *Nieves* exception. *Murphy*, 2023 WL 5748752 at *2; Pet.App.6a.

While this Court made it clear in *Gonzalez* that all objective evidence should be considered by Courts in determining whether a case falls within the *Nieves* exception, this Court also made it clear that just because a Petitioner is able to point to some objective evidence that they were arrested for a crime when others generally are not arrested for the same crime does not mean that the Petitioner has presented sufficient objective evidence. *Gonzalez v. Trevino*, 602 U.S. ___, 144 S.Ct. 1663, 1667 (2024). These are two separate analyses that must be examined separately. *Id.* at 1672 (J. Alito concurring). Therefore, the Eighth Circuit’s determination, following a review and discussion of Petitioner’s allegations, that “as 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” is in line with this Court’s opinions in both *Nieves* and *Gonzalez*. *Murphy*, 2023 WL 5748752 at *2; Pet.App.6a.

Additionally, the Eighth Circuit properly excluded the arresting officer’s post-arrest statements when conducting the *Nieves* objective evidence inquiry, because the officer’s statements are subjective evidence that is not properly considered by Courts when conducting *Nieves* object evidence inquiry. *Id.* Petitioner raises many arguments as to why the arresting officer’s post-arrest statements should be considered by courts while conducting the *Nieves* objective evidence inquiry, but they all fail in light of this Court’s long-standing position an arrest should be examined under objective standards of

reasonableness and that subjective evidence of an officer's motives or state of mind provide no basis for invalidating an arrest and are "irrelevant at this stage." *Nieves v. Bartlett*, 587 U.S. 391, 402, 139 S.Ct. 1715, 1724 (2019)(citing *Devenpeck*, at 153).

Therefore, because the Eighth Circuit properly considered all of Petitioner's allegations of objective evidence and found them to be insufficient to satisfy the narrow *Nieves* exception, certiorari should not be granted in this case. Furthermore, it is not necessary to reverse and remand this case, as Petitioner calls for in his supplemental brief, since the Eighth Circuit considered all objective evidence set before it in accordance with *Gonzalez*.

STATEMENT OF THE CASE

Respondent disagrees with how Petitioner has chosen to describe the factual background of the matter as Petitioner has included inflammatory allegations that are irrelevant to the issues presented. Most notably, allegations that an officer, who took no part in the decision to arrest Petitioner, threatened to punch Petitioner after he was already in custody is irrelevant to Petitioner's Complaint as a whole and is certainly not relevant to the questions presented to this Court. Therefore, Respondent sets forth his own statement of the case, focusing on the facts that are relevant to the questions presented before this Court.

Respondent Michael Schmitt, while on duty as a police officer in Sunrise Beach, Missouri, witnessed Petitioner Mason Murphy walking on the wrong side

of the highway at night in a rural area. Pet.App.30a-31a. Respondent believed Petitioner might be intoxicated, so Respondent pulled over to speak with Petitioner. Pet.App.41a. Respondent demanded that Petitioner identify himself, and Petitioner refused to do so. Pet.App.31a-32a. The parties argued for several minutes, and Respondent ultimately arrested Petitioner. Pet.App.31a-34a. Following the arrest, Petitioner alleges Respondent made the following statements, recited verbatim from Petitioner's Complaint:

79. Schmitt then initiated a phone call to a person unknown to Plaintiff, although pursuant to context it appears that the person on the other line was some sort of colleague or superior to whom Schmitt had called for advice.
80. Only Schmitt's side of the call is audible.
81. Schmitt stated during the call that he had arrested Murphy because he "saw the dip shit walking down the highway and would not identify himself" and he "ran his mouth off."
82. At minute 36 Schmitt asked, "What can I charge him with?"
83. At minute 37 Schmitt admitted, "I can't smell anything on him."
104. At minute 45 Schmitt stated to Murphy, "I suspected you were under something."

For your safety I wanted to check you out and know who you are.”

116. At minute 56 Schmitt said Murphy could “sit here for being an asshole.”
117. At minute 57 Schmitt initiated a phone call to Morgan County for a record check on Murphy, stating “please let there be a warrant”.
118. At minute 58 Murphy came back clean and in response Schmitt said “damn”.
119. At minute 61 Schmitt stated “I didn’t want him walking down my highway.”

Pet.App.38a-42a. Petitioner remained in a holding cell for two hours before ultimately being released. Pet.App.42a-43a. Respondent never stated that he did not believe Petitioner had committed a crime but only expressed uncertainty over how to charge Petitioner. Furthermore, Respondent never stated that he arrested Petitioner in retaliation for protected speech.

In his Complaint, Petitioner attempted to allege that officers frequently witness people walking on the wrong side of the highway, have probable cause to arrest these people and exercise their discretion not to. In support of this, Petitioner alleged,

21. 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 in either Sunrise Beach or Camden County for walking on the wrong side of the road in violation of RSMo. 300.405.2.

132. In the alternative, others have not been arrested for walking with traffic.
133. This was a circumstance where officers have probable cause to make arrests, but typically exercise their discretion not to.
134. Walking 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.31a, 44a-45a. While Petitioner alleged the above, Petitioner did not present or attempt to present any evidence in support of these allegations. Instead, Petitioner stands on their allegations and argues that he is not required to present any actual evidence to fall within the *Nieves* exception and survive a motion to dismiss. Petition for Writ of Certiorari at 22-23.

The only remaining claim from Petitioner's Complaint is Retaliation for the Exercise of First Amendment Rights. The district court dismissed Petitioner's claim, and the Eighth Circuit Court of Appeals affirmed the dismissal because Petitioner admitted Respondent had probable cause to arrest

him for walking on the wrong side of the highway in violation of Section 300.405.2, RSMo, and Petitioner failed to present sufficient objective evidence that officers frequently have probable cause to arrest people for walking on the wrong side of the highway and exercise their discretion not to. *Murphy*, 2023 WL 5748752 at *2; Pet.App.6a.

The parties agree that Respondent had probable cause to arrest Petitioner for violating Section 300.405.2, RSMo. The issue here is whether the Eighth Circuit properly analyzed and considered the allegations contained in Plaintiff's Complaint when it concluded that Petitioner failed to present sufficient objective evidence.

REASON FOR DENYING CERTIORARI

Petitioner (Schmitt) pled that the officer (Murphy) had probable cause to arrest him, which is normally fatal to a claim for retaliatory arrest. Among the elements for retaliatory arrest a plaintiff "must plead and prove the absence of probable cause for the arrest." *Nieves*, 587 U.S. at 402. In *Nieves*, this Court left open a narrow exception to the "absence of probable cause" rule for cases wherein protected speech motivates the arrest. The exception may apply 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." *Id.* at 407.

This Court further established in *Gonzalez v. Trevino* that such evidence may take many forms so

long as the evidence is objective. *Gonzalez*, 144 S.Ct. at 1667.

Petitioner requests certiorari because he claims that the Eighth Circuit improperly failed to give legal significance to Petitioner's allegations that 1) no one had been arrested for the same crime as Petitioner in recent memory, and 2) the arresting officer's post-arrest statements. Petition for Writ of Certiorari at 19-20, 30-31.

Petitioner presents two questions for this Court: (1) whether the *Nieves* exception allows courts to consider allegations that no one else has been arrested for the same crime; and (2) whether the *Nieves* exception allows courts to consider the arresting officer's statements after the arrest. Petition for Writ of Certiorari at ii.

Respondent agrees with the basic premise that *Nieves*, as interpreted in *Gonzalez*, permits courts to consider selective enforcement evidence to overcome the "no probable cause" requirement for retaliatory arrest, so long as it is objective evidence. But, in the context of a pleading reviewed under the Rule 12(b)(6) standard, the Eighth Circuit correctly ruled Petitioner's allegation failed to sufficiently allege the existence of objective evidence to meet the *Nieves* requirement. *Murphy*, 2023 WL 5748752 at *2; Pet.App.6a. The pleading standard requires more than a bare recital of the exception. As stated in *Gonzalez*, "a plaintiff must produce evidence to prove that his arrest occurred in such circumstances" to fall within the *Nieves* exception. *Gonzalez*, 144 S.Ct. at 1667. Furthermore, just because a plaintiff produced

some objective evidence that no one has been arrested for the same crime they had been, does not mean that the plaintiff has produced sufficient objective evidence to survive a motion to dismiss. *Id.* at 1668. (remanding *Gonzalez* to lower courts to determine whether the alleged objective evidence is sufficient to satisfy the *Nieves* exception and survive motion to dismiss). Therefore, in order to allow a court to analyze whether a plaintiff has alleged sufficient objective evidence to satisfy the *Nieves* exception, a viable pleading of that exception must at least describe the objective evidence on which the exception is to be based.

Here, Petitioner failed to describe the objective evidence on which their allegation that no one in recent memory had been arrested for the same crime as Petitioner was based. Furthermore, Petitioner essentially admits that they possess no such objective evidence, as they plead that further investigation and discovery will prove their allegation. Therefore, the Eighth Circuit correctly held that Petitioner failed to produce sufficient evidence to fall within the *Nieves*.

The second question presented has also been answered in *Nieves*. The Court stated that an officer's post-arrest statements are irrelevant for purposes of the *Nieves* objective evidence inquiry. *Nieves*, 587 U.S. at 407. Perhaps an admission that the arrest was retaliatory would overcome that, but this case presents nothing of the sort for the Court to consider.

Therefore, the only real question presented before this Court is whether the Eighth Circuit

properly considered Petitioner’s allegations that, if he is given opportunity to further investigate and conduct discovery, he will be able to show that no one in recent memory has been arrested for the same crime as him.

The record demonstrates that the Eighth Circuit properly considered Petitioner’s allegations that no one in recent memory had been arrested for the same crime as him and properly excluded the arresting officer’s post-arrest statements and is, therefore, in accordance with *Nieves* and *Gonzalez*. *Murphy*, 2023 WL 5748752 at *2; Pet.App.6a. Thus, Certiorari should be denied as Petitioner’s questions presented have both been answered by this Court, and the Eighth Circuit’s opinion is not in conflict with any of this Court’s rulings.

**I. THIS COURT CLARIFIED THE
“OBJECTIVE EVIDENCE” STANDARD IN
GONZALEZ AND THE EIGHTH CIRCUIT’S
DECISION IS CONSISTENT WITH GONZALEZ**

Petitioner’s first question, whether the *Nieves* probable cause exception allows courts to consider allegations that no one else has been arrested for the same crime, has already been answered by this Court in *Gonzalez*. However, this Court should not grant, vacate, and remand the Eighth Circuit’s decision in this case because the Eighth Circuit’s affirming Respondent’s Motion to Dismiss is consistent with *Gonzalez*.

In *Gonzalez*, this Court clarified that the *Nieves* exception does not require that the plaintiff

present strict comparator evidence. *Gonzalez*, 144 S.Ct. at 1668. Instead, this Court held that all objective evidence should be considered by Courts in determining whether the plaintiff has presented sufficient objective evidence that he or she was arrested “when otherwise similarly situated individuals not engaged in the same sort of protected speech has not been.” *Id.* (quoting *Nieves*, 587 U.S. at 407).

In *Gonzalez*, this Court held that the plaintiff’s evidence, following a survey of the county’s misdemeanor and felony data, showing that no one had been charged with the same crime she had in the previous decade, qualified as this sort of objective evidence. *Id.* However, the fact that she presented **some** objective evidence, does not mean that she had presented **sufficient** objective evidence, as is made clear by the fact that this Court remanded the case to the lower courts to “assess whether Gonzalez’ evidence suffices to satisfy the *Nieves* exception.” *Id.* at 1668. Justice Alito made this distinction clear in his concurrence, stating, “Judges should not conflate the question whether certain evidence can be considered under the *Nieves* exception with the entirely distinct question whether the evidence suffices to satisfy the threshold inquiry.” *Id.* at 1672 (J. Alito concurring).

Petitioner’s Complaint contained the following allegations, which Petitioner asserts constitute sufficient objective evidence to fall into the *Nieves* exception:

22. 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 in either Sunrise Beach or Camden County for walking on the wrong side of the road in violation of RSMo. 300.405.2.
135. In the alternative, others have not been arrested for walking with traffic.
136. This was a circumstance where officers have probable cause to make arrests, but typically exercise their discretion not to.
137. Walking 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.

The Eighth Circuit did not disregard these allegations, as Petitioner claims, but instead examined them and found them lacking. After a review of these allegations, the 8th Circuit concluded,

These are “threadbare recitals of a cause of action’s elements, supported by mere conclusory statements” that “are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 663–4. To “determin[e] whether a complaint states a plausible

claim[.]” we “draw on . . . experience and common sense.” *Id.* As 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.

Murphy, 2023 WL 5748752 at *2; Pet. App. 6a. The Eighth Circuit examined Petitioner’s allegations and found them to be severely lacking. Petitioner did not provide any actual evidence, but instead pled allegations that they believed would be proven if they were given the chance to investigate further and conduct discovery. Additionally, Petitioner did not provide any sort of timeframe for when he believed no one had been arrested for the crime of walking on the wrong side of the highway, instead stating that “no one else in recent memory” had been arrested for the crime. Pet.App.31a. Because of the lack of concreteness and lack of any actual evidence to back up Petitioner’s allegations, the Eighth Circuit rightfully found them to be insufficient to establish that the case fell into the *Nieves* exception. *Murphy*, 2023 WL 5748752 at *2; Pet.App.6a.

Furthermore, even if the Eighth Circuit did ignore Petitioner’s allegations, as Petitioner claims, it would not warrant remanding the case, as Petitioner’s allegations do not constitute objective evidence. The plaintiff in *Gonzalez* alleged to have conducted a thorough review of the county’s misdemeanor and felony data to determine that no

one else had been arrested for the same crime she had in the previous ten years. *See Gonzalez*, 144 S.Ct. at 1666. Petitioner presented no such evidence. Here, the petitioner simply states 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 in violation of RSMo. 300.405.2.” Pet.App.31a. Petitioner does not allege that he conducted any research, surveys, interviews with officers, or any further research as to whether anyone has been arrested in violation of RSMo. 300.405.2 in Sunrise Beach or Camden County. Additionally, while the plaintiff in *Gonzalez* showed that no one in ten years had been arrested for the same crime she had been charged with, Petitioner does not provide any sort of timeframe for when he believes no one has been arrested for this crime, except to say that no one has “in recent memory” has been arrested. While these allegations, if backed up by any evidence, would certainly be objective evidence that should be (and was) considered by the Eighth Circuit, Petitioner presented no such evidence. Therefore, even if the Eighth Circuit did fail to consider Petitioner’s allegations, it would still not warrant remanding the case back to the lower courts, because Petitioner failed to present any actual evidence. *Id.* at 1667 (“To fall within the exception, a plaintiff must produce evidence to prove that his arrest occurred in such circumstances.”)

The Eighth Circuit did not ignore or cast aside Petitioner’s allegations, as Petitioner claims. Instead, the Eighth Circuit considered all of Petitioner’s allegations and drew upon their expertise and

experience to determine that Petitioner’s allegations did not constitute sufficient objective evidence to fall into the narrow exception to the probable cause rule this Court established in *Nieves*. *Murphy*, 2023 WL 5748752 at *2; Pet.App.6a. (“As 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.”). Therefore, the Eighth Circuit’s ruling is in accordance with *Gonzalez*, and Petitioner’s Petition for Certiorari should be denied.

**II. AN OFFICER’S POST-ARREST
STATEMENTS CANNOT BE CONSIDERED IN
DECIDING WHETHER A CASE FALLS WITHIN
THE *NIEVES* EXCEPTION.**

In establishing the *Nieves* exception to the probable cause requirement, this Court reiterated the need to keep the initial analysis strictly objective and to set aside any subjective evidence at the initial stage of determining whether a case falls within the *Nieves* exception. *Nieves*, 587 U.S. at 407-408. The *Nieves* exception, “provides an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard.” *Id.* “Because this inquiry is objective, the statements and motivations of the particular arresting officer are irrelevant at this stage.” *Id.* (citing *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S.Ct. 588, 593 (2004) (“As we have repeatedly explained, the fact that the officer does not have the state of mind which is hypothecated by the reasons

which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.") (internal citations omitted). It is only after Petitioner has passed the initial objective inquiry that subjective evidence, such as an officer's post-arrest statements, may be used to attempt to establish an officer's retaliatory motive under the *Mt. Healthy* analysis. *Gonzalez*, 144 S.Ct. at 1672 (J. Alito concurring)("Second, evidence that tends to show only that the plaintiff's constitutionally protected speech was a "substantial or motivating factor" behind the adverse action should not be considered unless and until the plaintiff can provide other evidence to satisfy the *Nieves* exception. This requirement flows from the recognition that the *Nieves* exception serves only as a gateway to the *Mt. Healthy* framework.")(internal citations omitted).

Here, Petitioner attempts to get around this Court's clear mandate by arguing that the officers' post-arrest statements, though subjective in nature, contain objective evidence. Petitioner argues that the Eighth Circuit should have considered the following statements by Respondent:

- 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," 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.

Petition for Writ of Certiorari at 29-30. Petitioner contends that these statements indicate that arrests for walking on the wrong side of the road never happen or are rare and that Respondent admitted that he arrested Petitioner for his expressive conduct. *Id.* However, these contentions are simply untrue. At most, these statements indicate that Respondent was not subjectively aware of the exact crime Petitioner had committed at the time of the arrest, though he was certain that Petitioner had committed a crime, and that Respondent was frustrated with Petitioner for refusing to identify himself following his detention.

Even if these statements did indicate that such arrests are rare or that Respondent arrested Petitioner for expressive conduct, it does not change the fact that the statements are subjective in nature. Black’s Law Dictionary defines subjective as “[b]ased on an individual’s perceptions, feelings, or intentions,

as opposed to externally verifiable phenomena.” Subjective Definition, *Black’s Law Dictionary* (12th ed. 2024). All of the statements Petitioner points to are based on the Respondent’s perceptions, feelings, and intentions and are not based on any externally verifiable phenomena. Therefore, they are subjective statements that this Court has stated are irrelevant in determining whether the *Nieves* exception applies. *Id.* at 407 (citing *Devenpeck*, 543 U.S. at 153).

This Court has clearly stated that an officer’s statements regarding his state of mind and motives should not be considered during the *Nieves* initial objective evidence inquiry. The Eighth Circuit faithfully applied this Court’s precedent and did not consider Respondent’s post-arrest statements. Therefore, this Court should not grant Certiorari.

CONCLUSION

For all the aforementioned reasons, Petitioner’s Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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