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

REPLY BRIEF FOR PETITIONER

ANYA BIDWELL
PATRICK JAICOMO
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.,
Ste. 900
Arlington, VA 22203

MARIE MILLER
Counsel of Record
INSTITUTE FOR JUSTICE
3200 N. Central Ave.,
Ste. 2160
Phoenix, AZ 85012
(480) 557-8300
mmiller@ij.org

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

This petition is a classic candidate for an order granting, vacating, and remanding. The Eighth Circuit panel majority applied the wrong standard before this Court explained the proper one. The panel majority believed it had to exclude Mason Murphy's allegations that no one else has been arrested for the same conduct and that it had to exclude all statements by the arresting officer. The majority also excluded other objective evidence in the video footage that supports these allegations.[1] Since then, this Court has instructed that all objective evidence may be considered.

Murphy filed his petition for certiorari while *Gonzalez* v. *Trevino*, 144 S. Ct. 1663 (2024) (per curiam), was pending before this Court. Murphy's petition asks whether courts may consider two kinds of allegations (or alleged evidence) for the *Nieves* probable-cause exception: (1) allegations that no one else has been arrested for the same conduct, and (2) officers' statements made after an arrest. Cert.Pet.i.

Gonzalez answered, "[t]he only express limit * * * on the sort of evidence a plaintiff may present for that purpose is that it must be objective * * * ." *Gonzalez*, 144 S. Ct. at 1667. The Court emphasized:

> [T]he fact that no one has ever been arrested for engaging in a certain kind of

[1] 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."

> 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.

Ibid. Also, *Gonzalez* concurrences confirmed that statements by officers can be objective, too. After all, *Gonzalez* clarified that the form of evidence does not matter—only its objectivity.

Murphy alleged both that no one else has been arrested for the same conduct and that officers' post-arrest statements confirm that similarly situated individuals do not get arrested. But (without *Gonzalez*'s guidance) the panel majority declined to consider these allegations, discarding them altogether and relying instead on its own "experience and common sense." Pet.App.6a. The majority also excluded other objective evidence in video footage.

But under *Gonzalez* all this objective evidence must be considered. As Judge Grasz explained in his dissent below (consistent with *Gonzalez*), the atypical nature of the arrest here could be inferred from the fact—alleged in the complaint and depicted in the video—that officers had such "trouble identifying [walking on the wrong side of the road] as the basis for the arrest." Pet.App.9a. And the officers' statements are objective evidence because they go beyond mere allegations of the arresting officer's state of mind and are probative of the key objective inquiry: whether Murphy "was arrested when otherwise similarly situated individuals not engaged in the same

sort of protected speech had not been." *Gonzalez*, 144 S. Ct. at 1665–1666 (quoting *Nieves* v. *Bartlett*, 587 U.S. 391, 407 (2019)).

The panel majority created a particularly acute conflict with *Gonzalez* because the video footage shows that *the officers'* own experience and common sense did not lead them to identify walking on the wrong side of the road as a basis for Murphy's arrest. The majority decided the motion to dismiss solely by "draw[ing] on [its own] experience and common sense." Pet.App.6a.

The Eighth Circuit should have a chance to reevaluate Murphy's complaint after *Gonzalez*, or this Court should grant certiorari and explain the Eighth Circuit's error before vacating and remanding.

I. Under *Gonzalez*, the Eighth Circuit panel majority improperly excluded objective evidence from its consideration of Murphy's complaint.

A. The panel majority excluded video-supported allegations that no one else in the county has been arrested for the same conduct.

Respondent Schmitt[2] argues that the panel majority "properly considered" Murphy's allegations that no one else in recent memory has been arrested for walking on the wrong side of the road. Br.Opp.10, 12–13. Schmitt reasons that the majority deemed these

[2] Respondent Schmitt misidentified himself as the petitioner and Murphy as an officer in his brief in opposition. Br.Opp.7.

allegations "insufficient" for purposes of the *Nieves* exception. Br.Opp.11–13.

But Schmitt conflates adequacy of specific allegations under the general pleading standard with sufficiency of a complaint's allegations as a whole under *Nieves*. Specific allegations in a complaint are accepted as true unless they are "legal conclusions or '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" *Barton* v. *Taber*, 820 F.3d 958, 964 (CA8 2016) (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009)). Sufficiency for the *Nieves* exception, by contrast, requires enough "objective evidence" in a complaint to support an inference that the claimant "was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 587 U.S. at 407.

The majority decided that Murphy's specific allegations that no one has been arrested for the same conduct are "not entitled to the assumption of truth." Pet.App.6a (citation omitted). That is the same thing as casting them aside. So these allegations were not part of the majority's evaluation of Murphy's complaint as a whole for sufficiency under *Nieves*. *Ibid.*

Schmitt insists (without any citation) that plaintiffs "must at least describe the objective evidence on which the exception is to be based," and that Murphy failed to supply such a description to support his allegations that no one else has been arrested for walking on the wrong side of the road. Br.Opp.9. This argument is unpersuasive for three key reasons.

First, Murphy *did* provide additional support for his allegations. He provided video footage showing that multiple officers could not identify walking on the wrong side of the road as justification for Murphy's arrest.[3] As Judge Grasz observed, the allegations and footage showing that Schmitt "was scrambling to justify the arrest" with "post hoc decision-making" support an inference that officers usually don't arrest people for walking on the wrong side of the road. Pet.App.9a–10a. If officers in Sunrise Beach County usually arrest for that conduct, then Schmitt and the other officers in the department would have had no trouble identifying that crime as a basis for Murphy's arrest. And yet, the video footage shows they struggled mightily and failed.[4]

This video footage is as much objective evidence as Sylvia Gonzalez's allegations that certain records exist to support her claim. See *Gonzalez*, 144 S. Ct. at 1666–1667. Schmitt characterizes Gonzalez's allegations as "evidence" and Murphy's allegations as something lesser, faulting Murphy for not alleging that he "conducted any research, surveys, [or] interviews with officers." Br.Opp.14.

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[3] Murphy also alleged post-arrest statements and actions by officers, which should have been considered. See *infra* Part I.B.

[4] The video makes this showing even excluding the arresting officer's post-arrest statements (which should be considered, see *infra* Part I.B.). The video shows that Schmitt made two phone calls trying to find a justification for Murphy's arrest. That is objective evidence that officers in Sunrise Beach County are unaccustomed to arresting people for walking on the wrong side of the road.

But Gonzalez did not submit any records of a survey (that is, actual evidence) with her complaint; she made only allegations—as plaintiffs do at the pleading stage. And it's unclear what research, surveys, or interviews with officers Murphy could have conducted before discovery to prove a negative (the absence of arrests for the same conduct). Still, Murphy did supply evidence supporting his allegations: body camera footage showing that officers couldn't come up with walking on the wrong side of the road as a basis for his arrest. This is evidence that, at least since the time those officers started working at the department, officers do not typically arrest for that conduct.[5]

Second, pleading on information and belief—which is what Murphy's allegations would amount to without the video and other support—"must be permitted" at this stage. *Ahern Rentals, Inc.* v. *EquipmentShare.com, Inc.*, 59 F.4th 948, 954 (CA8 2023). 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.,

[5] Schmitt perplexingly argues that Murphy "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 [sic] been arrested." Br.Opp.14. Schmitt provides no support for this supposed timeframe requirement. *Ibid.* But "recent memory" is an appropriate (even if imprecise) timeframe given that the relevant statute has been on the books since 1965. 1965 Mo. Laws 461. Also, Murphy's allegations and video show that—from the time the officers started working for the department—they had not arrested others for walking on the wrong side of the road.

dissenting). Also, records of non-arrests usually don't exist, so public records are a poor source of evidence. Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 Nw. U. L. Rev. 987, 1023–1024 (2021).

Third, this Court has never required plaintiffs to describe evidence supporting an allegation that no one else has been arrested for comparable conduct. Rather, an allegation on information and belief that no one else has been arrested is itself "objective evidence" (as an alleged objective fact) that officers typically exercise their discretion not to arrest for that conduct. See *Gonzalez*, 144 S. Ct. at 1667. Indeed, if Murphy's allegations must be disregarded as "threadbare recitals of a cause of action's elements, supported by mere conclusory statements," as the panel majority treated them below, Pet.App.6a (citation omitted), then so too must allegations that "jaywalking here happens all the time and no one in the past half-century has been arrested for it." Yet, this Court in *Nieves* used this hypothetical jaywalker as an example of a plaintiff who could satisfy the *Nieves* exception. See *Nieves*, 587 U.S. at 407; *Gonzalez*, 144 S. Ct. at 1673 (Alito, J., concurring).[6]

Schmitt's brief in opposition (by ignoring the video evidence) highlights the fact that the panel majority did not consider even the objective evidence of the video footage supporting Murphy's allegations, relying instead solely on their own (and not the officers') "experience and common sense." Pet.App.6a. Under

[6] As we explained in the petition, allowing pleadings on information and belief does not mean any allegation goes. Cert.Pet.22–23.

Gonzalez, that exclusion of objective evidence was error.

B. The panel majority excluded all officers' post-arrest statements, and more.

Schmitt argues that all post-arrest statements by an officer are subjective evidence that must be excluded. Br.Opp.15–16. Parsing this Court's words in *Nieves* like statutory text, Schmitt relies on a dictionary definition of "subjective" and reasons that all statements an officer utters are based on his perceptions, feelings, and intentions, so they must be subjective and thus excluded. Br.Opp.17–18. This argument suffers from two sets of critical flaws.

First, it is "a mistake to read judicial opinions like statutes." *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2281 (2024) (Gorsuch, J., concurring). And if Schmitt's definition of "subjective evidence" were correct, then a plaintiff's allegations based on his own perceptions, feelings, and intentions would have to be excluded—including, "I reviewed police reports and criminal charging documents for the past 10 years in the county and observed no records of anyone else being arrested for the same conduct." Yet, this is precisely the kind of "evidence" Schmitt says is required. Br.Opp.14. Similarly, Schmitt's argument that all statements by an arresting officer are subjective and so must be excluded clashes with his observation that

"[p]erhaps an admission that the arrest was retaliatory" could be considered.[7] Br.Opp.9.

Second, setting aside these logical problems, *Nieves* and *Gonzalez* do not support Schmitt's argument. *Nieves* charted an analysis that departed from the standard established in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). Under *Mt. Healthy*, a plaintiff can state a prima facie case of retaliation based on allegations of a person's state of mind, alone. Not so under *Nieves*. It's not enough to rely "solely on allegations about an arresting officer's mental state." *Nieves*, 587 U.S. at 404. Instead, the *Nieves* exception turns on "an objective inquiry": Was the plaintiff "arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been"? *Id.* at 407.

With this context, officers' statements are "objective evidence" under *Nieves* when they go beyond the officer's subjective motive and are probative of the objective inquiry, above. *Gonzalez* confirms as much. The "only express limit" on the sort of evidence that may be considered "is that it must be objective." 144 S. Ct. at 1667. Concurring opinions in *Gonzalez* specify that officers' statements can meet this "objective" requirement, and when they do they should be considered. See *Gonzalez*, 144 S. Ct. at 1672 (Alito, J., concurring) (observing that an officer's affidavit testifying that no one has been prosecuted in the jurisdiction for engaging in similar conduct may be considered);

[7] Schmitt's argument also clashes with his assertion that Murphy's allegations could suffice if Murphy had conducted and described interviews with officers. Br.Opp.14.

id. at 1678 (Jackson, J., concurring, joined by Sotomayor, J.) (observing that "statements in the arresting officer's warrant affidavit suggesting a retaliatory motive" may be considered).

Thus, objective evidence lies in an officer's statements that "I have never before arrested someone for walking on the wrong side of the road," and "nobody in this department has experience arresting people for this conduct." The same is true of the officers' statements here, hunting for a crime that would support Murphy's arrest, like, "What [charge] can I give him?" and "I'm going to talk to the [Prosecuting Attorney], see what I can get on him." Video 36.08–36.25, 49.35–49.40. These are not mere allegations that an officer had retaliation on his mind. And they are probative of whether others have been arrested for the same conduct. They show that Schmitt, and those with whom he spoke at the jail, had no experience arresting anyone else for walking on the wrong side of the road. The statements are also verifiable, because they were recorded. Some of the statements are near-admissions—like statements that Schmitt brought Murphy to the jail because Murphy was "refusing to identify himself," and that Murphy could "sit here for being an asshole." Video 36.10–36.20, 56.20–56.30. And the statements were made after the arrest, not contemporaneously with it. See Cert.Pet.31–34. So they should have been considered.

The majority below categorically excluded all of Schmitt's statements at the jail, along with all the other objective evidence in the video, apparently

because the video included Schmitt's statements.[8] Cert.Pet.32 & n.15.

Again, just because a court (like the Seventh Circuit) considers an arresting officer's post-arrest statements does not mean the plaintiff satisfies the *Nieves* exception. See Cert.Pet.34; *Lund* v. *City of Rockford*, 956 F.3d 938, 946–947 (CA7 2020). But under *Gonzalez*, the panel majority should have considered various types of objective evidence that it excluded: statements by Schmitt at the jail going beyond allegations of his state of mind; footage showing that Schmitt lied about what happened on the side of the road; other officers' post-arrest statements revealing a lack of experience arresting people for walking on the wrong side of the road; and video of officers struggling to come up with a basis for Murphy's arrest.

II. The Eighth Circuit should be given the chance to correct its decision in light of *Gonzalez*, or this Court should grant certiorari and explain the Eighth Circuit's error before vacating and remanding.

The Eighth Circuit did not have the benefit of *Gonzalez*'s instruction that courts should consider all

[8] Although Schmitt disagrees, Br.Opp.3, the fact that the jail supervisor said things like, "In here you're not going to run your mouth to me, 'cuz I'll just as soon punch you in the face and put you in that chair" is relevant, objective evidence that Murphy was treated differently from similarly situated individuals. These statements evince a practice at the jail of officers giving harsher treatment to people who "run their mouths," which "makes it more likely that an officer *has* declined to arrest someone for engaging in [the same] conduct in the past." *Gonzalez*, 144 S. Ct. at 1667.

objective evidence that a person was arrested when similarly situated people were not. Both *Gonzalez* and this case concern allegations that no one else has been arrested for the same conduct. To be sure, Gonzalez also alleged that survey statistics support her allegations, whereas Murphy supplied video footage supporting his parallel no-one-else-has-been-arrested allegations. But that difference does not mean Murphy's allegations should have been discarded while Gonzalez's should be considered. The lesson from *Gonzalez* is that the form of evidence (video, alleged survey data, affidavits, well-pled facts on information and belief) does not matter—only its objectivity.

Likewise, the Eighth Circuit should be allowed to revisit its treatment of Schmitt's statements and the other objective evidence in the video, given *Gonzalez*'s instruction that courts should consider the full scope of objective evidence the plaintiff has offered to establish differential treatment.

Alternatively, this Court should grant the petition to explain the Eighth Circuit's error. After all, the panel majority opinion below conflicts with *Gonzalez* and the Seventh Circuit's *Lund* decision.

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,

MARIE MILLER
Counsel of Record
INSTITUTE FOR JUSTICE
3200 N. Central Ave.
Ste. 2160
Phoenix, AZ 85012
(480) 557-8300
mmiller@ij.org

ANYA BIDWELL
PATRICK JAICOMO
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.
Ste. 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org
pjaicomo@ij.org

Counsel for Petitioner

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