

App No. _____

**In The
Supreme Court of the United States**

MASON MURPHY,

Applicant,

v.

MICHAEL SCHMITT,

Respondent.

**On Application for an Extension of Time to File Petition for a Writ of
Certiorari to the United States Court of Appeals for the Eighth Circuit**

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To the Honorable Brett Kavanaugh, as Circuit Justice for the United States Court of Appeals for the Eighth Circuit:

In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Applicant respectfully requests that the time to file his petition for a writ of certiorari be extended for 60 days, up to and including Friday, May 10, 2024. The Court of Appeals issued its opinion on September 6, 2023 (Exhibit B) and issued its order denying rehearing en banc on December 12, 2023 (Exhibit A). Absent an extension of time, the petition would be due on March 11, 2024. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

Judgment Sought to Be Reviewed

This case involves an important question on which this Court has already granted certiorari in *Gonzalez v. Trevino*, No. 22-1025: Whether the probable-cause exception to claims for retaliatory arrests that this Court announced in *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019), can be satisfied by objective comparator evidence other than specific examples of arrests that never happened. Unlike *Gonzalez*, which concerns a months-long scheme to arrest a government critic orchestrated by a mayor, police chief, and attorney-turned-"Special Detective," this case concerns an on-the-spot decision to make an arrest by an on-the-scene police officer.

While Applicant Mason Murphy was walking along the right side of a rural road in Missouri, Respondent Officer Michael Schmitt stopped him and demanded identification. Murphy asked why, and Schmitt accused him of being drunk. (He was not, and Schmitt later admitted to another officer on the scene that Schmitt did not

smell alcohol on Murphy.) The two continued to argue, and Murphy continued refusing to identify himself. Instead, Murphy criticized and challenged Schmitt for poor police conduct. Ex. B at 2, 6–7.

After about ten minutes, Schmitt arrested Murphy. Murphy asked why. Schmitt refused to answer. On a verbally contentious drive to the station, Murphy again asked why he was being arrested. This time Schmitt responded that he had arrested Murphy for “failure to identify.” Once at the station, Schmitt made a call to an unknown person and said he “saw [a] dip shit walking down the highway” who “would not identify himself” and “ran his mouth off.” Schmitt then asked the person, “What can I charge him with?” Despite all of Schmitt’s stated misgivings about an appropriate criminal charge, he insisted Murphy “sit here for being an asshole.” After roughly two hours in jail, Murphy was released. Ex. B at 2, 6–7.

Murphy sued Schmitt for retaliatory arrest, but he could not contest probable cause because a Missouri Statute criminalizes walking along the right, as opposed to left, side of the road. Mo. Rev. Stat. § 300.405.2. As a result, Murphy’s case was subject to dismissal under *Nieves*’s rule that “probable cause should generally defeat a retaliatory arrest claim,” unless Murphy’s case fell into a carve-out sometimes called the “jaywalking exception”:

[A]t many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual’s retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest.

Nieves, 139 S. Ct. at 1727. Out of this concern, *Nieves* held that “the no-probable-cause requirement should 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*.

Because Murphy had been arrested for walking along a road while he was vocally complaining about police conduct, he invoked the jaywalking exception. But the district court dismissed Murphy's claims against Schmitt at the 12(b)(6) stage before permitting discovery (Exhibit C), and a 2-1 Eighth Circuit panel affirmed. For his evidence, Murphy alleged in part 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.” Murphy further offered that “[w]alking on the wrong side of the road occurs all the time on the highways with wide shoulders” and that officers observing such behavior “typically exercise their discretion not” to arrest. The panel rejected Murphy’s allegations as insufficient to “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,” despite the “similarities between jaywalking and walking on the wrong side of the road.” Ex. B at 4–5.

Judge Grasz dissented. He argued that “[b]ecause Murphy plausibly asserted that the [police do] not regularly enforce this law, his First Amendment retaliation claim survives under the exception adopted by the Supreme Court in” *Nieves*. Reiterating that the case was at the motion-to-dismiss stage, Judge Grasz explained that

“Schmitt was scrambling to justify the arrest.” Further, if police “regularly enforce[] 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.” Instead, considering the facts in Murphy’s favor, “Schmitt arrested Murphy for challenging and criticizing him before later exploring various legal justifications for the arrest,” which “indicate[s] pretext” and supports the application of the jaywalking exception. According to Judge Grasz, Murphy’s allegations were sufficient because “most, if not all, of the ‘objective evidence’ about whether * * * 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.” But Murphy never had the opportunity to discover more specific evidence because his claims were prematurely dismissed. Ex. B at 5–8.

Murphy petitioned for rehearing en banc. The Eighth Circuit denied Murphy’s petition, but Judges Kelly, Erickson, and Grasz would have granted rehearing. Ex. A.

Reasons Why an Extension of Time Is Warranted

Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. On January 30, 2024, Applicant retained new, pro bono counsel to file a petition. The undersigned were not previously involved in litigating this case, and they require additional time to familiarize themselves with the record and prepare the petition.

There is also the press of business. Chief among counsel's current obligations is briefing and preparation for oral argument before this Court in *Gonzalez v. Trevino*, No. 22-1025. In addition, counsel have ongoing work on litigation in:

- *Taylor v. LeBlanc*, 5th Cir. Case No. 21-30625;
- *King v. United States*, W.D. Mich. Case No. 1:16-CV-00343;
- *Mohamud v. Weyker*, D. Minn. Case No. 0:17-CV-02069;
- *Rosales v. Bradshaw*, D.N.M. No. 1:20-CV-00751;
- *Rosales v. Lewis*, W.D. La. Case No. 1:22-CV-05838;
- *Quiñonez v. Does 1 through 5*, N.D. Cal. No. 3:22-CV-03195;
- *Petersen v. City of Newton*, S.D. Iowa No. 4:23-CV-00408;
- *Hadley v. City of South Bend*, N.D. Ind. No. 3:24-CV-00029.

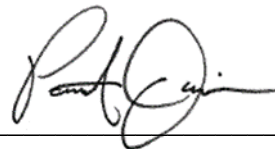
Applicant has not previously sought an extension of time from this Court.

Conclusion

Applicant requests that the time to file a writ of certiorari in the above-captioned matter be extended 60 days to and including Friday, May 10, 2024.

February 5, 2024

Respectfully submitted,



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