No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

DANIEL EDWARD GONZALEZ—PETITIONER

VS.

THE STATE OF CALIFORNIA—RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO

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QUESTION PRESENTED

California Health and Safety Code section 11370.1 makes possessing certain drugs while armed a felony. Because mere misdemeanor drug possession is a nonviolent crime and because being "armed," *i.e.*, having a "loaded, operable firearm . . . available for immediate offensive or defensive use" is protected by the Second Amendment to the United States Constitution, does section 11370.1 violate the Second Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF PRIOR PROCEEDINGS

- *People v. Daniel Edward Gonzalez*, Riverside County Superior Court No. RIF1900678 (original trial and conviction. Judgment entered October 24, 2019);
- *People v. Daniel Edward Gonzalez*, California Court of Appeal No. E073987. Direct appeal. Judgment affirmed on March 3, 2022;
- *People v. Daniel Edward Gonzalez*, California Supreme Court No. S274024. Petition for discretionary review. Petition denied on May 18, 2022.

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OPINIONS BELOW

The opinion of the California Court of Appeal affirming petitioner's challenged conviction is published. (Appendix ("App.") 1; see *People v. Gonzalez*, 75 Cal. App. 5th 907 (2022).) The order of the California Supreme Court denying petitioner's petition for discretionary review is unpublished. (App. 13.)

JURISDICTION

On March 3, 2022, the California Court of Appeal issued a published opinion affirming petitioner's conviction. (App. 1.) On July 18, 2012, the California Supreme Court denied discretionary review. (App. 13.)

The Court of Appeal rejected petitioner's contentions that her conviction for possessing methamphetamine while armed violated the Second Amendment as interpreted by this Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution, Second Amendment

"A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

California Health and Safety Code section 11370.1

"(a) Notwithstanding Section 11350 or 11377 or any other provision of law, every person who unlawfully possesses any amount of a substance containing cocaine base, a substance containing cocaine, a substance containing heroin, a substance containing methamphetamine, a crystalline substance containing phencyclidine, a liquid substance containing phencyclidine, plant material containing phencyclidine, or a hand-rolled cigarette treated with phencyclidine while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years.

As used in this subdivision, 'armed with' means having available for immediate offensive or defensive use."

STATEMENT OF THE CASE

A jury convicted petitioner of three felonies: possession of methamphetamine while armed with a firearm, Cal. Health & Safety Code, § 11370.1; being a convicted felon in possession of a firearm, Cal. Pen. Code, § 29800; and being a convicted felon in possession of ammunition. Cal. Pen. Code, § 30305, subd. (a). Petitioner admitted two prior strikes. The trial court sentenced him to six years in state prison. App. 2-3 & fn. 2.

On appeal, petitioner argued that because section 11370.1 made a crime out of having a firearm during a nonviolent crime, it violated the Second Amendment. Petitioner relied on the dissenting opinion of then-Judge, now Justice, Amy Coney Barrett in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), where she wrote that felon-in-possession statutes violate the Second Amendment when they disarm individuals convicted of non-violent crimes that demonstrate no propensity for violence. On March 3, 2022, the Court of Appeal filed a published opinion[1] in which it affirmed the judgment. App. 1. Petitioner did not seek rehearing.

Petitioner filed a timely petition for discretionary review on the issue presented here. App. 14-37. On May 18, 2022, the California Supreme Court denied review.

[1] *People v. Gonzalez* (2022) 75 Cal. App. 5th 907.

STATEMENT OF FACTS

As the Court of Appeal opinion recites, petitioner "was caught parked on the side of the road with about .6 grams of methamphetamine and a loaded, operable firearm." App. 2-3.

REASONS FOR GRANTING THE PETITION

I. In Creating a New Felony out of Merely Possessing a Firearm While Committing a Nonviolent Crime, the Challenged Statute Violates the Second Amendment.

A. Introduction

The Second Amendment to the U.S. Constitution provides, "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller*, 554 U.S. 570 (2008) ("*Heller*"), this Court interpreted the right to "bear arms" protected by the Second Amendment as the right to "wear, bear, or carry [arms]. . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at p. 584. It held that the Second Amendment secures the right of self-defense "against both public and private violence." *Id.* at p. 594. These rights were not dependent on the existence of a state militia. *Id.* at 599-600.

The protections of the Second Amendment apply to the states through the Due Process Clause of the Fourteenth Amendment. *McDonald v. City of*

Chicago, 561 U.S. 742, 791 (2010). ["*McDonald*".) Thus, all federal and state laws regulating arms must pass muster under the Second Amendment.

In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022) ("*Bruen*"), which was decided after the California Supreme Court denied review in petitioner's case, this Court confirmed that the Second Amendment applies in public. *Id.* at 2134-2135. States may not deny concealed carry permits because the applicant has not shown a particularized need to carry a gun. *Id.* at 2156. In so holding, *Bruen* rejected the means-end scrutiny test applied by the majority of courts post-*Heller*, including the Court of Appeal here. Instead, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2126-2127.

The *Bruen* majority did not quote or endorse the assumption in *Heller* that laws preventing convicted felons or the mentally ill from possessing firearms were constitutional. See *Heller*, *supra*, 554 U.S. at 627-627. This omission is consistent with, and possibly influenced by then-Judge, now Justice, Barrett's dissent in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), where she wrote that blanket disarmament of all convicted felons, including those convicted of nonviolent crimes, was inconsistent with the historical record. Justice Barrett's dissent, discussed in detail below, informs

petitioner's argument that nonfacilitative gun possession during the commission of a nonviolent crime may not be criminalized.

The Court of Appeal applied means-end scrutiny to reject petitioner's constitutional challenge. App. 5-6. This conflicts with relevant decisions of this Court. Supreme Court Rule 10(c). It also incorrectly relied on cases discussing *facilitative* gun possession. App. 7-8. Whether Congress or the states may create new crimes out of non-facilitative gun possession that occurs during the commission of a nonviolent crime is an important federal question that should be settled by this Court. Supreme Court Rule 10(c).

B. <u>Discussion</u>

California Health and Safety Code section 11370.1, subdivision (a) provides that anyone who possesses methamphetamine "while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. As used in this subdivision, 'armed with' means having available for immediate offensive or defensive use." With exceptions not applicable here, simple possession of methamphetamine is only punished as a misdemeanor by up to one year in county jail. Cal. Health & Safety Code, § 11377, subd. (a).

To convict the defendant of simple drug possession, the jury must find:

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;

3. The defendant knew of the substance's nature or character as a controlled substance;
4. The controlled substance was a particular substance or analog thereof; and
5. The controlled substance was in a usable amount. CALCRIM No. 2304.

None of these elements involves acts of violence, either expressly or by implication. See, e.g., 18 U.S.C. § 924(c)(3): "[T]he term 'crime of violence' means an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" Thus, simple drug possession is a non-violent crime. Because gun possession is protected by the Second Amendment, and because restrictions on gun possession are limited to preventing violent crime, section 11370.1 is unconstitutional.

Cases on felon-in-possession statutes are relevant to petitioner's challenge to section 11370.1. *Dicta* from *Heller* posited certain limits to Second Amendment rights.

> "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, *supra*, 554 U.S. at 626-627.

Cases have addressed whether and to what extent people convicted of nonviolent felonies may be prohibited from owning firearms. Pertinent here,

in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), the defendant had been convicted of mail fraud for substantially defrauding Medicare, a crime that carried a maximum twenty-year prison term. He served a year and a day in prison. He then brought suit challenging the federal and Wisconsin felon-in-possession statutes. The district court granted summary judgment against him. *Id.* at 440.

On appeal, the *Kanter* majority noted that although several circuits had considered the possibility that nonviolent felons might not fall under the *Heller dicta*, only one court had so ruled, in a case involving defendants ultimately convicted of nonviolent misdemeanors. *Id.* at pp. 443-444. The majority then discussed competing theories of Second Amendment rights to assess whether or not at the founding nonviolent felons had or retained a right to keep and bear arms. Deeming the evidence inconclusive, the majority resolved Kanter's case by applying means-end scrutiny. *Id.* at pp. 445-447.

Applying intermediate scrutiny, the majority upheld the prohibitions. *Id.* at pp. 447-451. It noted the government's interest in keeping firearms away from persons likely to misuse them. *Id.* at p. 448. It cited statistics produced by the governments about felons convicted of nonviolent crimes who later committed acts of violence. *Id.* at pp. 448-449. It rejected Kanter's argument that the government's showing must be tailored to him personally and his allegedly stable, nonviolent, and reformed circumstances. *Id.* at p.

449. It also disagreed with Kanter's self-assessment given the scope of his serious financial crime. *Id.* at p. 450. The majority concluded that the challenged felon dispossession statutes were "substantially related to the important governmental objective of keeping firearms away from those convicted of serious crimes." *Id.* at p. 451. Since *Bruen* eliminated means-end scrutiny, the *Kanter* majority analysis is no longer sound.

Then-Judge, now Justice, Barrett dissented. After surveying competing theories, Justice Barrett first held that, notwithstanding his status as a convicted felon, Kanter had Second Amendment rights. The question was whether Wisconsin and the federal government could nonetheless prevent him from possessing a gun. *Id.* at 453. Given that the *Heller* majority admitted it had not justified its assumptions about felon-in-possession laws, Justice Barrett agreed that the *Heller dicta* "does not settle the question" of which felons may constitutionally be barred from possessing firearms. *Id.* at 454.

Justice Barrett rejected the proffered rationales for felon-in-possession statutes.

> "Wisconsin and the United States advance three basic historical arguments in support of this categorical exclusion. First, they say that there is some evidence suggesting that founding-era legislatures deprived felons of the right. Second, they argue that because the states put felons to death at the time of the founding, no one would have questioned their authority to take felons' guns too. And third, they insist that founding-era legislatures

> permitted only virtuous citizens to have guns, and felons are not virtuous citizens.
>
> As I explain below, none of these rationales supports the proposition that the legislature can permanently deprive felons of the right to possess arms simply because of their status as felons. The historical evidence does, however, support a different proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. This is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness." *Ibid*.

Justice Barrett then proceeded to discuss each rejected theory. *Id.* at 454-458. Addressing founding-era proposals and practices, she noted that Pennsylvania had proposed a guarantee of the right to arms "unless for crimes committed, or real danger of public injury from individuals." She did not interpret this in the conjunctive, but, rather, that the "real danger" part modified "crimes committed." *Id.* at p. 456. "The concern common to all three [state proposals] is not about felons in particular or even criminals in general; it is about threatened violence and the risk of public injury." *Ibid*. Justice Barrett then reviewed practices at common law and in the colonies of disarming people perceived as threats such as Catholics, Indians, and slaves. *Id.* at 456-458. "In sum, founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety. But neither the

convention proposals nor historical practice supports a legislative power to categorically disarm felons because of their status as felons." *Id.* at p. 458.[2]

Justice Barrett agreed that "the state can take the right to bear arms away from a category of people that it deems dangerous." It is not limited to case-by-case exclusions, and it may make "present-day judgments about categories of people whose possession of guns would endanger the public safety[.]" *Id.* at 464. However, "[t]he legislature must be able to justify its designation[.]" *Id.* at 465. The categorical bans for convicted felons were, however, "wildly overinclusive." *Id.* at 466 [citation omitted].

Where nonviolent felons are concerned, "the reasoning that supports the categorical disarmament of violent felons—that past violence is predictive of future violence—simply does not apply." *Id.* at p. 467. Justice Barrett was not persuaded by the governments' statistics about mail fraud recidivism and subsequent violent crimes. *Id.* at 468. "[W]hile both Wisconsin and the United States have an unquestionably strong interest in protecting the public from gun violence, they have failed to show, by either logic or data, that disarming

[2] Justice Barrett then rebutted as historically inaccurate the assumptions that all felons could be disarmed because they all would have been put to death in the founding era and that Second Amendment rights are grounded in a civic virtue theory that permits forfeiture for any breach of civic virtue. *Id.* at 458-464. The latter argument was inconsistent with *Heller*, which had held that the right to bear arms was a personal right not dependent on any civic connection. *Id.* at p. 463.

Kanter substantially advances that interest." *Id.* at 469 [citation omitted]." The majority's holding treated the Second Amendment as "a second-class right[.]" *Ibid*. [citation omitted].

Justice Barrett's interpretation best accords with the principles underlying the Second Amendment. The fact that gun possession, at home or in public, entails some risk to public safety does not defeat it. Illegal violence is a collateral consequence that must be borne if the Second Amendment is to have any meaning.

> "Municipal respondents maintain that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety. Brief for Municipal Respondents 11. And they note that there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries. *Id*., at 11, 13-17. The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category. See, *e.g*., *Hudson* v. *Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) ('The exclusionary rule generates "substantial social costs," *United States* v. *Leon*, 468 U.S. 897, 907, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), which sometimes include setting the guilty free and the dangerous at large'); *Barker* v. *Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (reflecting on the serious consequences of dismissal for a speedy trial violation, which means 'a defendant who may be guilty of a serious crime will go free'); *Miranda* v. *Arizona*, 384 U.S. 436, 517, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (Harlan, J., dissenting); *id*., at 542, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (White, J., dissenting) (objecting that the Court's rule '[i]n some unknown number of cases . . . will return a killer, a rapist or other criminal to the streets . . . to repeat his

> crime'); *Mapp*, 367 U.S., at 659, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications." *McDonald*, *supra*, 561 U.S. at 782-783.

To the point that constitutional protections are not without cost may be added the observation that under the First Amendment, much that is culturally damaging, dangerous, cruel, borderline obscene, or simply idiotic enjoys constitutional protection to safeguard the dignity interest in free speech and to protect open debate. *Heller* acknowledged this.

> "The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people[.]" *Heller*, *supra*, 554 U.S. at 635.

Heller acknowledged the widespread problem of handgun violence but stated that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Id.* at 636.

Although *Kanter* did not involve an arming enhancement, it seems undeniable that Kanter committed mail fraud while he possessed the gun or guns that he was forced to surrender. He may even have been in the same room with the gun or guns when he committed the fraud, but no one suggested that his mail fraud was worse because of this. The logical

implication of Justice Barrett's view that nonviolent felons do not automatically lose Second Amendment rights is that Kanter could commit fraud *again* with a gun in the house and his gun possession would still be irrelevant to his culpability and future Second Amendment rights.

Here, possession of methamphetamine, like possession of alcohol, marijuana, automobiles, or anything else, is, without more, a nonviolent activity and, it follows, a nonviolent crime. Because section 11370.1 builds a crime around exercising Second Amendment rights while committing this nonviolent crime, it is unconstitutional.

The Court of Appeal's rejection of this argument does not withstand scrutiny. Adopting a means-end scrutiny test, it first holds that petitioner had no Second Amendment rights to offend because he violated a statute prohibiting being armed while possessing drugs and the Second Amendment applies only to law-abiding citizens. App. 5-7. The defendant in *Kanter*, of course, was not a law-abiding citizen. Further, this reasoning begs the question because the issue here is whether the state may constitutionally create a felony defined as committing a nonviolent crime while your gun is around. The fact that it has done so does not answer the question.

The Court of Appeal cites a number of cases holding it is constitutional to punish the possession of firearms for unlawful "purposes." App. 7-8. This case is not about facilitative use. To convict petitioner of violating section

11370.1, the prosecution just had to prove he possessed his drugs while he knew, however vaguely, his gun was around. CALCRIM No. 2303. Anyone committing a nonviolent crime at home, be it drug possession or mail fraud, is going to know that his gun is around. That does not mean the gun is possessed for the criminal purpose of committing the nonviolent crime.

Citing *United States v. Yancey*, 621 F.3d 681, 686 (7th Cir. 2010), the Court of Appeal held section 11370.1 constitutional because it keeps guns out of the hands of illegal drug users. The defendant in *Yancey* was not just an illegal drug user. He convicted under a statute that applied to habitual users and addicts. *Id.* at 683. In rejecting the Second Amendment challenge, the Seventh Circuit analogized habitual users and addicts to the mentally ill, who, according to the *Heller dicta*, may be disarmed. *Id.* at 685-686.

Yancey has nothing to do with simple possession. Given that *Bruen* did not endorse the *Heller* dicta about disarming the mentally ill, *Yancey's* rationale is questionable. At any rate, California disarms addicts under a different statute. Cal. Pen. Code, § 29800, subd. (a)(1). Petitioner's challenge to section 11370.1 should not be rejected because one can imagine it applying to someone who properly should be prosecuted under section 29800.

Similarly, the Court of Appeal cited *In re Ogea*, 121 Cal. App. 4th 974, 979 (2004), noting that a violation of section 11370.1 is not considered a nonviolent drug possession offense for purposes of diversionary treatment.

App. 11. It is hardly surprising that a gun possession crime is not considered nonviolent. The question here is whether the Second Amendment permits such a crime to exist. *Ogea*, which predates *Heller* and *Bruen*, involved no Second Amendment challenge and is irrelevant to this issue.

Finally, the Court of Appeal suggests that even under the *Kanter* dissent, criminalizing drug possession in the vicinity of gun possession is constitutional because the combination threatens the public safety. App. 11-12. As stated above, this Court has recognized that the risk of illegal gun violence is one that must be borne if the Second Amendment is to have any meaning. There are undoubtedly limits to Second Amendment rights. However, creating new felonies by tethering nonviolent crimes to incidental gun possession is not one of them.

CONCLUSION

Neither the Court of Appeal nor the state proved that section 11370.1 is constitutional. The petition for writ of *certiorari* should be granted.

Dated: August 16, 2012

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