NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CELSO YANEZ, Petitioner,

VS.

CALIFORNIA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a mandatory sentence of 45 years to life, imposed on a 56-year-old first-time offender in a sexual abuse case involving no violence, no force, no threats, no penetration and no physical injury, violates the Eight Amendment's ban against cruel and unusual punishment.

LIST OF PARTIES

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

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Petitioner Celso Yanez ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Sixth Appellate District, in Case No. H044868.

OPINIONS BELOW

The unreported opinion of the California Court of Appeal, Sixth Appellate District, affirming the judgment on appeal is attached as Appendix A. *See also People v. Yanez*, No. H044868, 2020 WL 1899052 (Cal. Ct. App., Apr. 17, 2017). The unreported order of the Court of Appeal modifying the opinion and denying rehearing is attached as Appendix B. The unreported order of the California Supreme Court denying the petition for review is attached as Appendix C.

JURISDICTION

The judgment of the California Court of Appeal, Sixth Appellate District, was entered on April 17, 2017. A timely petition for review was denied by the California Supreme Court on July 15, 2020. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution (§ 1):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This sexual abuse case involves two families who lived in nearby apartment complexes in Sunnyvale, California. The families were close friends over a period of six or seven years in the early 2000s, attending church together and socializing on weekends and holidays. 3RT 607, 658; 5RT 1239, 1241-42, 1335. Petitioner was the father of one of the families. Petitioner's daughter, Evelyn, was in the same grade as Jessica, one of the two daughters in the other family. 2RT 319; 3RT 656-57, 710, 769-70; 5RT 1238, 1241. Jessica's sister was Monica, who was a year younger. 2RT 316-17; 3RT 708; 5RT 1239. At the time of the conduct alleged, Jessica was 12 and 13 years old, and Monica was 11 years old.

Petitioner was ultimately found guilty with respect to two incidents of abuse involving Jessica. In the kitchen incident, Jessica was in Petitioner's apartment with Evelyn and Monica, and Petitioner asked Evelyn to go get the mail. 3RT 720. Jessica testified that Petitioner asked if Jessica and Monica wanted a snack; Monica went into the kitchen first, and Jessica went in when Monica returned to the living room. 3RT 721. According to Jessica, after she grabbed a fruit snack and turned around to leave, Petitioner pulled her in by her left shoulder, said something she did not understand, gave her a hug, and tried to give her a kiss. 3RT 724. Jessica testified that Petitioner then let her

go without kissing her, and that Evelyn came back into the apartment a few seconds later. 3RT 727-28.

Jessica also testified that Petitioner touched her inappropriately at a baby shower for her younger sister Priscilla, who was born in February 2010, when Jessica was 13 years old. 3RT 709, 737-38. The baby shower was held in a mobile home, and there were approximately 30 people at the party. 3RT 738-39. According to Jessica, Petitioner came onto the outside porch while she was there alone during the party and gave her a hug. 3RT 738, 740. She stated that she turned around while he was hugging her, and that Petitioner reached beneath her black sweater from her waist area with one hand, went under her shirt and bra, and squeezed her breast. 3RT 738, 741. Jessica testified that she pushed him away and went back inside. 3RT 744.

Petitioner was found guilty of one incident involving Monica. Monica testified that the incident occurred at Petitioner's apartment complex pool. 3RT 608. She stated that she was in the pool with Petitioner and Evelyn, and that she was wearing a tank top and shorts in the pool, with underwear. 3RT 608-09, 612. According to Monica, Evelyn eventually swam to the side and pulled herself out of the pool, and had her back turned to Petitioner and Monica for a few seconds while she did so. 3RT 609-10, 614. During that short period of time, Monica testified that Petitioner came up from behind her

in the pool, grabbed her around the waist with his left hand, and then used his right hand to touch the front of her body. 3RT 608, 610-11, 616. Monica stated that Petitioner's right hand started at her ankle, moved up the front of her leg, brushed past her vagina, and move up between her breasts, stopping at her neckline. 3RT 611-14. According to Monica, the entire incident lasted three seconds, and the touching itself took about a second. 3RT 614, 671. Monica stated that she had initially believed that the contact was accidental. 3RT 615, 695.

Approximately five years after the incidents involving Jessica and Monica, Petitioner was charged with non-forcible lewd acts upon a child under fourteen years old, in violation of California Penal Code section 288(a). 1CT 297-300.[1]

A violation of Penal Code section 288(a) is typically punished by a sentence of three, six or eight years imprisonment. However, the counts here alleged a multiple victim enhancement under Penal Code section 667.61(b) and (e) (the "One Strike law"). 1CT 297-300. The involvement of more than one victim was the only aggravating circumstance that increased Petitioner's sentence to 15-years-to-life on each count.

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[1] The prosecution also charged Petitioner with five additional counts of the same offense involving Jessica and Monica, but these are not at issue in this Petition because the jury acquitted on all five.

Petitioner pleaded not guilty and was tried by jury. 1CT 160, 225; 6RT 1503.

The jury returned guilty verdicts on Count One (Monica/pool), Count Five (Jessica/kitchen) and Count Seven (Jessica/baby shower), and found the multiple victim enhancement to be true for each of these counts. 7RT 1807-12. At sentencing, and pursuant to Penal Code section 667.61(b), the trial court imposed a mandatory indeterminate term of 15 year to life on Counts One, Five and Seven, for a total sentence of 45 years to life. 9RT 2415; 2CT 368-69.

REASONS FOR GRANTING THE WRIT

This case raises an important constitutional issue related to criminal punishment: whether a first-time sex offender can be sentenced to a mandatory effective sentence of life imprisonment without the possibility of parole (LWOP) in a case involving no violence, no force, no threats, no sexual penetration, and no physical injury.

The State of California's "One Strike law" mandates life sentences for enumerated sex offenses committed under certain aggravating circumstances. Most of the law's provisions involve either especially serious sex offenses (rape, sodomy, forcible oral copulation, forcible sexual abuse, sexual penetration) or particularly harmful or dangerous situations (torture, mayhem,

great bodily injury, kidnapping). However, on occasion, the law is applied to an individual like Petitioner, who groped two victims for a moment, without any violence, force, threats, penetration or physical injury. The question is whether a mandatory effective LWOP sentence under such circumstances, in a case involving a defendant with no prior convictions, violates the Eighth Amendment's prohibition against cruel and unusual punishments.

The Eighth Amendment bars the imposition of lengthy prison sentences that are grossly disproportionate to the underlying offenses. *Graham v. Fla*., 560 U.S. 48, 59-60 (2010). While "successful challenges to the proportionality of particular sentences have been exceedingly rare" (*Rummel v. Estelle*, 445 U.S. 263, 272 (1980)), this Court applies greater scrutiny to mandatory life sentences without the possibility of parole. *Miller v. Alabama*, 567 U.S. 460, 474-75 (2012). And although the Court defers to the States' power to mandate life sentences in cases involving repeated offenders (*e.g.*, *Lockyer v. Andrade*, 538 U.S. 63 (2003)), the Court has not yet spoken to the issue raised by this Petition, namely whether a State can lock up a first-time sex offender and "throw away the key" when the crime involves no violence, no force, no threats, no sexual penetration, and no physical injury.

Under the Court's established three-factor inquiry (*Graham*, 560 U.S. at 60), it is beyond cavil that the sentence imposed here violated the Eighth

Amendment to the Constitution. The sentence of 45 years to life was extraordinarily severe, especially considering the underlying offense conduct and Petitioner's lack of criminal history. The sentence imposed against Petitioner was also grossly disproportionate given the sentences received by other offenders in the State of California. In fact, the sentence for the two momentary gropes and the attempted kiss was the same that would be imposed for *three second-degree murders* under California's Penal Code. In addition, the sentence imposed for the same crime – fleeting sexual batteries against a minor – in other jurisdictions is far less than under California's One Strike law.

It is time for this Court to recognize that the United States Constitution provides some meaningful limitation to mandatory LWOP sentences in cases involving first-time offenders who are not juveniles. The Court should grant the Petition and hold that the Eighth Amendment's ban against cruel and unusual punishments prohibits mandatory multiple life sentences imposed on a first-time sex offender when the underlying conduct involves no violence or other similar aggravating circumstances.

I. The Court Should Grant Certiorari to Make Clear that the Eighth Amendment's Prohibition Against Cruel and Unusual Punishments Bans the Imposition of Mandatory Life Sentences on a First-Time Offender in a Sex Abuse Case Involving No Violence, Force, Threats, Penetration or Physical Injury

To clarify that the Eighth Amendment prohibits the imposition of mandatory life sentences for a first-time sex offender in a case not involving

violence, force, threats, penetration or physical injury, the Court should grant certiorari.

A. Although Generally Applicable Only to the Most Serious Sex Offenses, California's One Strike Law Permits the Imposition of Multiple Life Sentences in Cases Involving Relatively Minor Sexual Contact with Two Victims

In relevant part, California's One Strike law imposes life sentences for a range of offenses set forth in Penal Code section 667.61(c), under aggravating circumstances described in section 667.61(d) and (e).[2] Most often, the One Strike law provides for life sentences only in especially serious sex cases. For instance, the predicate offenses include rape (§ 667.61(c)(1)-(3)), forcible lewd or lascivious act (§ 667.61(c)(4)), sexual penetration (§ 667.61(c)(3), (c)(5)), sodomy (§ 667.61(c)(6)) and forcible oral copulation (§ 667.61(c)(7)). Along the same lines, the aggravating circumstances triggering a life sentence include a prior sex crime conviction (§ 667.61(d)(1)), kidnapping (§ 667.61(d)(2), § 667.61(e)(1)), aggravated mayhem or torture (§ 667.61(d)(3)), residential burglary (§ 667.61(d)(4)), personal infliction of great bodily injury (§ 667.61(d)(6)), personal infliction of bodily injury on a child (§ 667.61(d)(7)), use of a dangerous weapon or firearm (§ 667.61(e)(3)), and tying or binding the victim (§ 667.61(e)(5)).

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[2] All further statutory references are to the California Penal Code, unless otherwise enumerated.

However, under the One Strike law, it is also possible to trigger mandatory, multiple life sentences even if a relatively less serious sexual offense is committed – such as a violation of section 288(a) involving mere transitory touching through clothing (§ 667.61(c)(8)) – against two victims (§ 667.61(e)(4)). That is what occurred with Petitioner here – he received three 15 years to life sentences, for conduct that is much less dangerous and injurious than that committed by the typical One Strike offender.[3]

B. As Applied Under the Circumstances Here, the One Strike Law Violates the Eighth Amendment's Prohibition Against Cruel and Unusual Punishments

1. Legal Standard

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., 8th Amend.; *see also* U.S. Const., 14th Amend.; *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (holding that the Eighth Amendment applies to States through the Due Process Clause of the Fourteenth Amendment). "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual

[3] Petitioner is not alone in this regard. *See*, *e.g.*, *People v. Cadena*, 252 Cal. Rptr. 3d 135 (Ct. App. 2019), *review denied and ordered not to be officially published* (Dec. 11, 2019) (cited not as precedent but solely to show that other similar cases exist as a matter of fact).

punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham*, 560 U.S. at 59, *quoting Weems v. United States*, 217 U.S. 349, 367 (1910); *see also Solem v. Helm*, 463 U.S. 277, 286 (1983) ("The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.").

To determine whether a sentence is grossly disproportionate for a defendant's crime, a "court must begin by comparing the gravity of the offense and the severity of the sentence." *Graham*, 560 U.S. at 60 (citation omitted); *see also Miller*, 567 U.S. at 469 (explaining that the right not to be subjected to excessive sanctions "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense") (citations and quotations omitted). "[I]n the rare case in which [this] threshold comparison ... leads to an inference of gross disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Graham*, 560 U.S. at 60 (citation and quotations omitted) (ellipsis and brackets in original).

In examining whether a sentence violates the prohibition against cruel and unusual punishments, this Court has recognized that an LWOP sentence

is "the second most severe penalty permitted by law." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring). That is because LWOP sentences "'share some characteristics with death sentences that are shared by no other sentences.'" *Miller*, 567 U.S. at 474, quoting *Graham*, 560 U.S. at 69; *see also Solem*, 463 U.S. at 297 (stating that, aside for the sentence of death, the LWOP sentence "is the most severe punishment that the State could have imposed on any criminal for any crime"). "Imprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable." *Miller*, 567 U.S. at 474-75 (citations and quotations omitted). An LWOP sentence "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." *Graham*, 560 U.S. at 69-70 (citation omitted). As such, it is "far more severe" than a typical life sentence. *Graham*, 560 U.S. at 70.

2. The Sentence of 45 Years to Life was Cruel and Unusual Punishment Given the Nature of the Offenses and Petitioner's History

The 45-years-to-life sentence imposed here was grossly disproportionate to the gravity of the underlying misconduct.

Petitioner received a sentence of 45 years to life for two gropes and one attempted kiss. Petitioner did not use torture, or violence, or threats of

violence, or force. There was no sexual intercourse, sodomy, oral copulation, or penetration. The conduct was extraordinarily brief. Monica testified that Petitioner touched her through clothing for only a few seconds in the pool incident (3RT 614, 671), and Jessica alleged two incidents that were extremely short in duration. 3RT 721, 724-728, 738, 740-41, 744. Neither Jessica nor Monica suffered any physical harm as a result of the conduct. Without minimizing the seriousness of the acts, multiple life sentences for fleeting sexual batteries against a 11 or 12-year-old – when the offense would generally be a mere misdemeanor if committed against an adult (Cal. Penal Code § 243.4) and when the touching that triggered the multiple life sentences was initially considered accidental by the victim Monica (3RT 615, 695) – are grossly disproportionate to the offense.[4]

The lack of proportionality between the conduct and the sentences imposed is even clearer when defendant's personal circumstances are considered. Petitioner, a handyman who only received schooling through the

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[4] The court of appeal disregarded the relatively minor nature of the abuse, and focused on Jessica's statement during the sentencing proceedings about the continuing psychological harm that she suffered. Appendix A at A35-36. But that is true of virtually *all* sexual abuse: it causes psychological harm, which is why even non-forcible abuse provides for imprisonment for three, six or eight years. Cal. Penal Code § 288(a). The presence of psychological harm, ubiquitous in sex cases, does not alone render a mandatory effective LWOP sentence for a first-time offender proportionate under the Eighth Amendment.

sixth grade in Guatemala, had no prior convictions. 2CT 356, 360, 366; see also 2CT 352 (probation report stating "PRIORS: None"). He has no known history of violence, whether against children or adults. In this sense, Petitioner's case is far different from other cases in which this Court upheld life sentences for defendants with prior criminal convictions. *See Rummel*, 445 U.S. at 266, 285 (upholding indeterminate life sentence for a defendant with two prior serious felony convictions who obtained money by false pretenses); *Andrade*, 538 U.S. at 66-68, 77 (upholding a Three Strikes sentence of 50 years to life for two counts of petty theft with a prior conviction); *see also Harmelin*, 501 U.S. at 994 (stating only that the defendant had no prior *felony* convictions, thereby indicating that he had a misdemeanor criminal history).[5]

Significantly, the probation department's use of an actuarial measure of risk for sexual offense recidivism also showed that Petitioner posed a low risk for re-offense. 2CT 355, 365. Petitioner's daughter testified that he was

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[5] The appellate court acknowledged that appellant's record "revealed no prior criminality," that he "been married with many years" with three children, and that he worked "regularly as a handyman," but it held those facts *against* him: "Thus, defendant was old enough to know and understand that he was committing very serious offenses and that he was inflicting severe emotional damage on Jessica and Monica." Appendix A at A36. Yet appellant's lack of criminal history over a long period of time should have counted *in favor of* a finding of cruel and unusual punishment, not against it.

a good father who would never commit this type of misconduct (5RT 1294-1295, 9RT 2408), and there was no allegation that Petitioner ever did anything wrong in the five years between the final offense and the time he was charged. In sum, nothing in Petitioner's background suggests that he is irredeemable, and yet that is exactly what the mandatory LWOP sentence he received assumes, without any individualized inquiry by the trial judge. *Graham*, 560 U.S. at 70; *see also Campbell v. Ohio*, 138 S.Ct. 1059, 1060 (2018) (statement by Sotomayor, J.), quoting *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982) (stating that it may be proper to require, in the LWOP context, that the sentencing scheme "ensure 'measured, consistent application and fairness to the accused'"); *Miller*, 567 U.S. at 475-79 (holding that the Eighth Amendment requires individualized sentencing decisions for youthful defendants facing the most serious penalties).

3. The Sentence of 45 Years to Life was Cruel and Unusual Punishment Given the Penalty Imposed in California for Other Offenses

Petitioner's sentence was grossly disproportionate given the sentence imposed in California for other offenses.

As stated above, Petitioner received 15 years to life for each of his convictions under section 288 even though the offenses did not involve torture, violence, the threat of violence, force or penetration. In California, such a

sentence is imposed for far more serious offenses. *See* Cal. Penal Code §§ 190(a) (15 years to life for murder in the second degree); 191.5(d) (15 years to life vehicular homicide with prior convictions); 205 (life with the possibility of parole for aggravated mayhem); 206, 206.1 (life with the possibility of parole for torture "inflict[ing] great bodily injury"); 288(i)(1) (life with the possibility of parole for a violation of section 288(a) "if the defendant personally inflicted bodily harm upon the victim"); *see also* §§ 217.1(a)-(b); 219; 664(e).[6] In addition, Petitioner received an effective LWOP sentence based upon all three counts. Once again, such a sentence is disproportional to the conduct when compared to other offenses in California carrying the same penalty. *See*, *e.g.*, Cal. Penal Code §§ 37(a) (treason); 128 (procuring the execution of an innocent person); 190(c) (second-degree murder involving a peace officer); 190.03 (first-degree murder that qualifies as a hate crime); 190.05(a) (murder in the second-degree with prior murder conviction); 190.2(a) (alternative LWOP penalty for murder with special circumstances).

Petitioner's punishment is also grossly disproportionate in comparison

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[6] The punishment for second-degree murder is particularly relevant in terms of determining the proportionality of Petitioner's sentences for nonhomicide crimes. *See*, *e.g.*, *Graham*, 560 U.S. at 69 (citations and quotations omitted) (stating that "[s]erious nonhomicide crimes may be devastating in their harm . . . but in terms of moral depravity and of the injury to the person and to the public, . . . they cannot be compared to murder in their severity and irrevocability").

to offenses that receive *lesser* sentences in California. For example, assault of a minor with intent to commit certain sex offenses – including rape, sodomy, oral copulation, or sexual penetration – is punishable by five, seven, or nine years in prison. Cal. Penal Code § 220(a)(2). Pimping or pandering a child under the age of 16 years old for prostitution is punishable by up to eight years (Cal. Penal Code §§ 266h(b)(2), 266i(b)(2)), and abducting a minor for prostitution is punishable by no more than three years. Cal. Penal Code §§ 266a, 18. Sexual penetration or sodomy with a child under 14 years and more than 10 years younger than the perpetrator is punishable by up to eight years (Cal. Penal Code §§ 286(c)(1), 289(j)), and one who restrains a minor and commits a sexual battery that involves touching the skin of the minor's sexual organs where the defendant has been previously convicted of the same crime is punishable by no more than four years in prison. Cal. Penal Code §§ 243.4(a), (f), (g)(1) & (j). None of these crimes is punishable under the One Strike law or subject to a life sentence even if committed on multiple occasions and against multiple victims.

Indeed, Petitioner's sentence is grossly disproportionate even *in light of the One Strike law's own terms*. Offenses that fall with the One Strike law are generally far more serious than the crimes defendant committed. For instance, under the One Strike law, 15-years-to-life terms are imposed when

the crimes of rape, sexual penetration, sodomy, and oral copulation are committed with the use of force, violence, or fear of immediate bodily injury, and when rape is forcibly committed in concert with others. Cal. Penal Code § 667.61(c). Rape, sexual penetration, sodomy, and oral copulation are *not* subject to punishment under the One Strike law if they occur because the victim is unconscious, asleep, or intoxicated, or the perpetrator has threatened the victim with arrest or deportation (*see* Cal. Penal Code §§ 261(a)(3), (4) & (7), 262(a)(2), (3) & (5), 286(f), (i) & (k), 667.71(c)). All of these offenses are far more serious than the charges in this case.

4. The Sentence of 45 Years to Life was Cruel and Unusual Punishment Given the Penalty Imposed in Other Jurisdictions

The crimes at issue in this case – which did not involve any intercourse, oral copulation, sodomy or penetration – are considered misdemeanors or low-level felonies in other States. *See*, *e.g.*, Or. Rev. Stat. Ann. § 163.415(1)-(2) (sexual contact with a minor a Class A misdemeanor); Ark. Code Ann. § 5-14-127 (misdemeanor); Va. Code Ann. § 18.2-67.4:2 (class 1 misdemeanor); Alaska Stat. Ann. § 11.41.438(a)-(b) (sexual contact with minor a class C felony); Colo. Rev. Stat. Ann. § 18-3-405(1)-(2) (class four felony); Del. Code Ann. tit. 11, § 768 (class F felony); Hawaii Rev. Stat. § 707-732(1)-(2) (class C felony); Ind. Code Ann. § 35-42-4-3(b) (class 4 felony); Iowa Code Ann. §

709.8(1)-(2) (class C felony). Even the felony offenses are punishable by only a relatively short period of time in jail or prison. *See*, *e.g.*, Colo. Rev. Stat. Ann. § 18-1.3-401(V)(A) (punishment of 2 to 6 years); Del. Code Ann. tit. 11, § 4205(b)(6) (up to three years in prison); Hawaii Rev. Stat. § 706-660(2)(b) (one to five years in prison); Ind. Code Ann. § 35-50-2-5.5 (sentence of 2 to 12 years, with an advisory sentence of 6 years). When a defendant is convicted of more than one offense, he or she does not face an LWOP sentence for the type of momentary sexual battery (without penetration) at issue in this case. *See*, *e.g.*, Alaska Stat. Ann. § 12.55.125(e)(1)-(4) (imprisonment for class C felony is 5 years or less, including if there are prior felony convictions); Va. Code Ann. §§ 18.2-10(f), 18.2-67.5:1 (current offense a Class 6 felony, with a term of 2 to 6 years, if previously committed of two or more offenses); *see also* Ind. Code Ann. § 35-50-2-14(f) (additional sentence of up to 10 years if prior sex offense convictions); Del. Code Ann. tit. 11, § 4205A (increased sentences for multiple offenses, but not for the type of sexual offenses charged here). In other words, when compared to the punishment for similar conduct in other States, Petitioner's sentence was grossly disproportionate.

A holding that the sentence imposed here is unconstitutional under the Eighth Amendment would not be revolutionary. Petitioner does not seek a

ruling that the entire One Strike law is invalid. However, when applied to the conduct here – which did not involve violence, force, threats, penetration or physical injury – and to a defendant without any criminal history, the Eighth Amendment should require some individualized inquiry by the sentencing court before the defendant is imprisoned for the rest of his life without the realistic possibility of parole.

II. This Case Constitutes an Excellent Vehicle to Resolve the Constitutional Issue Presented

This case is an ideal vehicle to address the Eighth Amendment issue presented. Petitioner is a first-time offender, with no criminal history apart from the instant offenses. He received a mandatory effective LWOP sentence, which is second only to the death penalty. The offense conduct was the minimum required to trigger the multiple life sentences under the One Strike law. The case would provide a powerful illustration of the outer limits of constitutional punishment. It would also exemplify why multiple life sentences deserve individual scrutiny by a sentencing judge when they involve a first-time offender and a crime with no violence or physical injury: namely, to allow an examination of the offender's "lessened culpability" and "capacity to change." *Graham*, 560 U.S. at 68.

In addition, although the sentence was not challenged under the Eighth Amendment in the trial court, it was fully raised on appeal, where the issue

was not deemed forfeited. Appendix A, at A34. The issue was then also preserved in the California Supreme Court, thereby making it ripe for this Court's review.

CONCLUSION

For the reasons expressed above, a writ of certiorari should issue to review the judgment of the California Court of Appeal, Sixth Appellate District.

Dated: October 13, 2020

Respectfully submitted,

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