No._____

IN THE SUPREME COURT OF THE UNITED STATES

HECTOR MANUEL GOMEZ RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of *Certiorari* To The United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A plurality of the Court in Harmelin v. Michigan, 501 U.S. 957, 996-1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment), held that although the Eighth Amendment's Cruel and Unusual Punishments Clause does not mandate a proportionality review for non-capital sentences, it nevertheless does not give a sentencing court carte blanche to impose any sentence without some constitutional inquiry. The Court in Ewing v. California, 538 U.S. 11, 29-30 (2003), essentially confirmed this.

The questions presented are as follows:

Did the Ninth Circuit contravene Harmelin's plurality and Ewing by essentially exempting all sentences that a district court imposes under 21 U.S.C. § 841(b)(1)(A)(vii), from Eighth Amendment scrutiny? Alternatively, should the Court overrule Harmelin and Ewing?

LIST OF PARTIES

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

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Eastern District of California, United States of America v. Hector Manuel Gomez Rodriguez, No. 1:19-cr-00161-DAD-BAM. The district court entered judgment on October 3, 2022.

2. United States Court of Appeals for the Ninth Circuit, United States of America v. Hector Manuel Gomez Rodriguez, No. 22-10250. The Ninth Circuit entered judgment on December 27, 2023.

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Petitioner Hector Manuel Gomez Rodriguez respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on December 27, 2023.

OPINION BELOW

A three-judge panel of the Ninth Circuit issued an unpublished memorandum disposition and entered judgment on December 27, 2023, dismissing Petitioner's appeal in part and otherwise affirming Petitioner's conviction and sentence.[1] App. 1-4.

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[1] A copy of the memorandum disposition is included in the Appendix. See App. 1-4 (United States v. Gomez Rodriguez, No. 22-10250 (9th Cir. Dec. 27,

JURISDICTION

The Ninth Circuit entered judgment in this case on December 27, 2023. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1). See also S. Ct. R. 13.3; S. Ct. Miscellaneous Order, July 19, 2021.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Petitioner draws the following factual rendition from the district court record, including the Presentence Report that he concomitantly lodges under seal with the Court.

A. Following His Father's Death When Petitioner Was a Young Child, Petitioner Leaves School at an Early Age to Earn Money for His Large, Impoverished Family in Mexico

Petitioner Hector Gomez Rodriguez was born in the Mexican State of Jalisco in 1974. He is the fifth oldest of nine children in his family. App. 195, 202.

Quite tragically, when Petitioner was only five years old, his father burned

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2023) (unpublished)).

to death after being caught up accidentally in a fire that Petitioner's father had started intentionally to clear vegetation. App. 202. Consequently, coupled with poor economic conditions in Mexico during the late 1970s and early 1980s, that necessitated Petitioner's leaving school at an early age to earn additional income for his family. App. 203.

Thus, after finishing Mexico's equivalent of the second grade when he was eight years old, Petitioner dropped out of school and began securing work as an agricultural laborer in Jalisco. During a typical week, he worked more than 40 hours for what most people would consider to be paltry wages – approximately $12.50-$15 per week. App. 203-04. And complicating matters further, Petitioner was often responsible for caring for his younger siblings when he was not working. App. 203.

B. Petitioner Eventually Migrates to the United States to Find Better Economic Opportunities

In approximately 1999, when he was 25 years old, Petitioner decided to move northward to the United States to earn more money for his family and himself. Consequently, for the next twenty years, Petitioner then journeyed back and forth between the two countries, entering the United States without legal authorization to do so; earning money while working as an agricultural laborer in

Arizona, Los Angeles, and California's Central Valley; and then traveling home to Mexico approximately every five years to visit his family, before once again returning to the United States.[2] App. 203.

C. Petitioner's Nuclear Family Remains in Mexico While He Labors in the United States

Before migrating initially to the United States, Petitioner married Araceli Ramirez Larios in Mexico in 1994. Ramirez Larios gave birth to the couple's now adult daughters – Judith Yanira Gomez Rodriguez and Jazmin Alejandra Gomez Rodriguez – in, respectively, 1997 and 2000. App. 203.

Petitioner's wife and daughters have remained in Mexico throughout his lengthy labor periods in the United States, residing in Pihuamo in the State of Jalisco. Id.

D. While Conducting Aerial Reconnaissance, a County Employee Locates a Marijuana Grow Operation in a National Forest

During an aerial reconnaissance sortie on June 12, 2019, a deputy from the Madera County Sheriff's Office in California's Central Valley observed a marijuana grow site within the Sierra National Forest's boundaries. That resulted in the deputy's conveying the plot's GPS coordinates to government agents for

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[2] ICE apprehended Petitioner in the United States at least once during that period, removing him to Mexico on February 4, 2017. App. 203.

further investigation. App. 197.

E. Government Agents Surveil the Grow Operation on Foot

Knowing the plot's location, officers from the United States Forest Service decided to learn more about it via physical surveillance. Consequently, a week following the aerial flyover, USFS officers descended on the area, interested in determining "drop points and access areas associated with the site." App. 197. Apparently soon thereafter, they observed a trail leading from a county road to a camp area that corresponded to the GPS coordinates that the Madera County deputy had furnished them. Id.

Within the camp, the USFS officers observed a "large dark tent with a tarp above, tied off to surrounding trees attempting to conceal the location." App. 197. Opining based on visual evidence, including footprints, that the trail was the site's main access route, the officers installed "license plate reading surveillance cameras" to further advance their investigation. Id. Consequently, during the succeeding six days, those devices "captured multiple subjects and multiple vehicles associated with the cultivation activities." Id.

Because those infrared cameras operated during early-morning and late-evening hours, periods with extreme darkness, the images that they captured were not sufficiently specific to allow investigators to discern the persons' identities.

App. 72.

F. The Government Obtains a Search Warrant for the Grow Site, Encounters Petitioner and His Brother There, and Arrests Them

Having developed some evidence of grow-related activities, the government then obtained a warrant from a magistrate judge in the United States District Court for the Eastern District of California on July 12, 2019, to conduct a full-fledged search of the subject site. App. 198.

Consequently, on July 16, 2019, at approximately 6:00 a.m., at least four law enforcement officers – including USFS Special Agents Michael Grate and Cooper Fouch – converged on the land plot. Special Agent Fouch, who "had prior knowledge of the area," took the lead approaching a trail that proceeded up a 20-30 foot incline toward the grow area. App. 52-54, 64-65, 74.

While the two USFS agents were squatting down to avoid being detected, they noticed a Latino man – whom they later identified as Petitioner – who was pacing back and forth on a tarp, walking to and from a cot that was located toward a cooking area within the camp. Using "ambient noise" to conceal their movement, all four law enforcement officers moved close to the grow area (approximately 15-20 feet away from Petitioner), before eventually sprinting up the hill, shouting, "Police, don't move." App. 55-57, 65, 198. Special Agent Grate did not recall whether the officers gave the admonition in both English and

Spanish.[3] App. 57.

According to Special Agent Grate, Petitioner initially "'locked eyes'" on the agents, who were dressed in "police tactical uniforms and body armor," while looking "down the hill" at them. App. 57. He then ran away from the camping site's cot, and headed downhill along the same trail that the agents had just ascended. App. 57-58. Special Agent Fouch and two other law enforcement officers chased after Petitioner, eventually apprehending and arresting him, following Petitioner's tripping over vegetation and falling. App. 58-59, 198. Law enforcement officers separately arrested Mucio Gomez Rodriguez after encountering him in a different sector of the growth plot, apprehending him after he attempted to flee on foot. App. 67, 198.

Initially approaching the camp site without entering it, Special Agent Grate noticed a firearm located there on a "little shelf ledge" close to three other items. App. 59-60. He later entered that area and – after inspecting the firearm, which was a .45 caliber handgun – rendered the gun inoperable by removing its magazine and unchambering a round of ammunition. App. 61-62, 198. The firearm had an obliterated serial number, and was located approximately five feet from where Petitioner was standing when the agents began shouting their verbal commands at

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[3] The PSR states the warnings did occur in Spanish. App. 198.

him. App. 66, 198. Agents also seized a "pellet gun" from a separate part of the growth plot. App. 68-69, 198.

Despite later opining that Petitioner at least theoretically could have used the firearm to shoot at the law enforcement officers, Special Agent Grate acknowledged on cross-examination during an evidentiary hearing that he never observed Petitioner move toward the weapon. Instead, Special Agent Grate testified, Petitioner fled the premises immediately upon noticing the officers were present there. App. 23-24, 63. Special Agent Fouch also testified on direct examination that Petitioner never attempted to access either of the two firearms when officers witnessed him during their raid on July 16, 2019. App. 69; see also App. 23-24.

Ultimately, investigating agents identified and removed 4,494 marijuana plants from the grow site in the Sierra National Forest. App. 198. They apparently did not obtain fingerprint-related evidence that could link anyone forensically to the firearms. App. 10-11.

G. In Post-Arrest Statements and Testimony, Petitioner Acknowledges That He Had Handled the Firearm Briefly the Day Before the Law Enforcement Raid Occurred

Following Petitioner's arrest, law enforcement agents Mirandized him, and he voluntarily acknowledged having been at the marijuana grow site for only three

days. Petitioner told the agents that he had returned to the Central Valley recently from Mexico after being recruited to play a minimal role at the site, in exchange for money that Petitioner needed to support himself and his family. Petitioner said that he had a meeting in Visalia, California, with the men who had contacted him, but he apparently could not otherwise identify them or anyone else in the grow operation. App. 198.

Perhaps most importantly, Petitioner told a Probation Officer who interviewed him before preparing the PSR that he had "touch[ed]" the firearm at the grow site on July 15, 2019, the day before the raid occurred. App. 74-75, 200. Otherwise, as Petitioner told the Probation Officer and reiterated during in-court testimony at the evidentiary hearing, he was present at the grow site for only three days, did not help to set up the camp area, and did not fire the gun at anything or anyone. App. 23-24, 73-75, 199-200.

Mucio Gomez Rodriguez separately acknowledged having been at the grow site for thirteen days, five days longer than his promised shift was supposed to last. App. 198. He expected to be paid $150 per day for his minor role. Id.

H. The Government Files a Complaint in the District Court, Naming Petitioner and His Brother as Defendants

The day following the law enforcement raid on the grow area, the

government filed a complaint in the United States District Court for the Eastern District of California. Therein, the government alleged that Petitioner and Mucio Gomez Rodriguez had violated (a) 21 U.S.C. § 846 by conspiring to manufacture marijuana, distribute it, and possess the controlled substance with intent to distribute it; and (b) 21 U.S.C. § 841(a)(1) by manufacturing marijuana. App. 113-23.

During separate initial appearances on July 17, 2019, before a magistrate judge, Petitioner and Mucio Gomez Rodriguez denied the complaint's allegations. App. 124, 127-30. A different magistrate judge later ordered the government on July 19, 2019, to detain Gomez Rodriguez pretrial. App. 136, 140-41.

I. A Grand Jury Returns an Indictment, Charging Both Petitioner and Mucio Gomez Rodriguez

Following a supplemental investigation, a grand jury empaneled in the Eastern District of California returned an indictment on July 25, 2017. It not only set forth the same two counts that appeared against Petitioner and Mucio Gomez Rodriguez in the complaint (adding that the putative offenses involved more than 1,000 marijuana plaints), but also charged the two brothers with violating 18 U.S.C. § 1361 by committing a putative "depredation" against "land and resources in the Sierra National Forest . . . ." App. 103-04.

During an arraignment before a magistrate judge on July 31, 2019, Petitioner and Mucio Gomez Rodriguez pleaded not guilty to all three of the indictment's counts. App. 142-145.

J. Following a Fulsome Proffer Session, Petitioner Executes a Plea Agreement That Contains an Appellate Waiver Provision

Following negotiations, Petitioner and the government executed a plea agreement, which they filed in the district court on February 10, 2022. App. 149-159.

Among other things, Petitioner agreed to plead guilty to intending to manufacture marijuana (count 2), acknowledging concomitantly that the government had "eradicated" more than 1,000 marijuana plants from the grow site. App. 150, 159. The parties did not agree to anything sentence-related for that offense, except for stating that Petitioner would be subject to a mandatory-minimum term under 21 U.S.C. § 841(b)(1)(A)(vii), unless he were "safety-valve eligible" under 18 U.S.C. § 3553(f) and U.S.S.G § 5C1.2. App. 155.

Petitioner and the government also stipulated to a limited set of agreed-upon, offense-related facts regarding the law enforcement raid on July 16, 2019, in the Sierra National Forest which Petitioner summarized supra (at 6-9). App. 153-54, 159. Notably, the factual basis specified only that there was a

"loaded pistol in the camp area" where the law enforcement officers noticed Petitioner. App. 159. Additionally, Petitioner further agreed to an appellate waiver regarding his conviction and sentence, permitting him to appeal only if the district court sentenced him to a term exceeding the statutory maximum for § 841(b)(1)(A)(vii). App. 155.

But the provision ambiguously noted that "the waiver includes, but is not limited to, any and all constitutional and/or legal challenges to [Petitioner's] conviction and guilty plea . . . ." – not his sentence. App. 155 (emphasis added)).

K. Petitioner Changes His Plea to Count 2 of the Indictment, and the District Court Informs Him That He Retains His Right to Appeal Non-Waivable Issues

During a change-of-plea hearing on February 22, 2022, the district court conducted a comprehensive Rule 11 colloquy, including making required advisals under Rule 11(b)(1), referring to the parties' stipulated factual basis under Rule 11(b)(3), and concluding that Petitioner had knowingly and voluntarily pleaded guilty to count 2 of the indictment. App. 160-175.

Perhaps most importantly, however, while setting forth the terms of Petitioner's appellate waiver, the district court specifically mentioned to Petitioner that – notwithstanding its general applicability if Petitioner did not receive a custodial term exceeding the statutory maximum (here, a life sentence,

see § 841(b)(1)(A)(vii)) – Petitioner could nevertheless prosecute an appeal "so long as any issue [he] wish[es] to raise is a non-waivable issue." App. 168-69.

L. Expressing Severe Reservations About Imposing a Mandatory-Minimum Custodial Term of 120 Months on a Minimal Participant Such as Petitioner, the District Court Requests a Full-Fledged Evidentiary Hearing to Determine Whether Petitioner Possessed a Firearm at the Grow Site

During what the parties at least preliminarily thought would be full sentencing hearings for Petitioner on May 31 and June 21, 2022, the government's prosecutor confirmed that Petitioner had indeed made an adequate proffer for a safety valve departure. And – at least in the government's estimation – he therefore had satisfied all but one of the factors necessary to receive safety-valve relief under § 3553(f) and § 5C1.2. App. 9-10; see also App. 45.

The government prosecutor opined, however, that Petitioner's stating that he had "touched" the firearm present in the grow area's camp site the day before government agents raided it in July 2019 therefore disqualified him because he had possessed the gun (either actively or constructively) while violating § 841(a)(1). App. 23-24, 34. In so doing, this created a sentencing-related disconnect between Petitioner and Mucio Gomez Rodriguez – a minor participant present at the site for ten days longer than Petitioner. App. 25-28, 198. The government's prosecutor attempted to justify its having offered safety valve relief

to Mucio Gomez Rodriguez because he, unlike his brother, ostensibly had never handled either of the two firearms (the .45 caliber handgun and the pellet gun) present at the grow site as of July 16, 2019.[4] App. 25-28.

Deferring its ruling on the issue, the district court noted that because Petitioner had the burden of proof regarding this part of the safety valve inquiry, it was inclined to conclude that Petitioner did indeed possess the firearm. App. 24-25, 29, 34. Instead, it continued the sentencing hearing so that the parties could prepare for an evidentiary hearing regarding the precise factual circumstances surrounding Petitioner and his proximity to the firearm on July 16, 2019, having noted that the fact pattern as he understood it was "razor thin" and a "close call" regarding Petitioner's putative possession. App. 34, 36-37.

Significantly, the district court explicitly noted that it would "readily" be considering a similar Guidelines range for Petitioner if the mandatory-minimum term were inapplicable – namely, an adjusted base offense level of 23, following a two-level downward adjustment under § 5C1.2, yielding a 46-57 month range. App. 11, 21-22; see also App. 75; U.S.S.G. Ch. 5, Pt. A.

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[4] During the sentencing hearing on September 26, 2022, the government's prosecutor candidly acknowledged Mucio Gomez Rodriguez's having stating that "he did not believe that his brother knew that the firearm was present." App. 27.

M. Following an Evidentiary Hearing, the District Court Concludes That Petitioner Actually Possessed the Firearm, and It Therefore Sentences the Safety-Valve-Ineligible Petitioner to a 120-Month Mandatory-Minimum Term

At the continued sentencing hearing on September 26, 2022, the district court heard testimony from two witnesses (Special Agents Grate and Fouch of the USFS) and admitted several photographic exhibits the agents took during the July 17, 2019, law enforcement raid of the grow site as evidence. App. 52-72, 86-94. It also heard testimony from Petitioner, who testified on direct examination that he had been at the site for only three days and had not handled the firearm – before retracting slightly on cross-examination that he had done nothing more than "touch" the gun the day before the raid occurred. App. 74-75.

Noting that a circuit split exists regarding actual or constructive possession of a firearm in the safety-valve context, the district court ultimately decided that it need not take a side because – at least in its estimation – Petitioner's admission and his proximity to the gun within the grow site's camping area illustrate that he had actually possessed it. App. 46, 48, 78-79.

Accordingly, with Petitioner being disqualified from safety-valve eligibility, the district court sentenced him to a mandatory-minimum custodial term under § 841(b)(1)(A)(vii) of 120 months, and also imposed a five-year supervised

release period. App. 79-82. Further, the district court ordered Petitioner, along with Mucio Gomez Rodriguez, to make $38,746,80 worth of restitution to the government, flowing from environmental damage that the grow operation caused in the Sierra National Forest. App. 82, 199.

But in so doing, as it had during earlier portions of the twice-continued sentencing hearing (see supra at 13-15), the district court criticized the mandatory-minimum term, lamented that it could not legally impose a shorter custodial term (particularly considering that it had done so for Mucio Gomez Rodriguez), and noted that it definitively would have sentenced Petitioner to a term no longer than 57 months if it had discretion to do so:

> I'm troubled by that conclusion. I think I was pretty clear about that at the prior hearings that that troubles me, because it does certainly create – it will create – if that's what I conclude, it will create a significant disparity in sentencing between [Petitioner] and his brother. His brother was found to be eligible for safety valve relief and was sentenced to 41 months. That's one of the reasons why I kept this case, the case of the co-defendant, because I had already resolved that.

App. 46-47. See also App. 50, 81.

The district court later stated that it did not "like the conclusion" it was "drawing," but deemed itself "compelled" to do so. App. 51. It added that it "wish[ed]" it "didn't have to reach this conclusion," and opined that it "[did not]

like this conclusion . . . ." App. 79. And, directly addressing Petitioner, the district court told him, "Mr. Gomez Rodriguez, as I indicated, I'd love, love to give you a discount. Congress – the United States Congress says I can't under my interpretation of the law. I wish it was different." App. 84-85.

Toward the hearing's end, the district court stated to Petitioner that he had waived his appellate rights, but noted that he could nevertheless file a notice of appeal if he so desired. App. 84.

N. The Court of Appeals' Disposition

Following a timely notice of appeal, Petitioner argued in the Ninth Circuit that the district court had plainly erred under the Eighth Amendment by having sentenced him to a mandatory-minimum custodial term (120 months) that was 79 months lengthier than his comparably culpable brother (41 months). App. 3-4

After hearing oral argument, the Ninth Circuit affirmed Petitioner's conviction and sentence on December 27, 2023, and entered judgment that same day. In pertinent part, the Ninth Circuit – after concluding that Petitioner's appellate waiver did not apply to constitutional claims (see App.3) – determined that the district court accordingly did not violate the Eighth Amendment by having imposed one here because the mandatory minimum term did "not give rise to 'an inference of gross disproportionality,'" and the Ninth Circuit also accorded

"'substantial deference'" to "Congress's authority in determining the punishments for federal crimes."[5] App. 4 (quoting Graham v. Florida, 560 U.S. 48, 60 (2010), and Solem v. Heim, 463 U.S. 277, 290 (1983)).

REASONS FOR GRANTING THE WRIT

1. In the plurality opinion in Harmelin v. Michigan, 501 U.S. 957 (1991), and the majority opinion in Ewing v. California, 538 U.S. 11 (2003), the Court crafted rules making it difficult – but, notably, not insuperable – for defendants sentenced according to determinant sentencing regimes to challenge mandatory minimum terms under the Eighth Amendment. See Ewing, 538 U.S. at 29-30; Harmelin, 501 U.S. at 996-1001 (plurality) (Kennedy, J., concurring in part and concurring in the judgment). Here, discussing Graham and Solem – but not Harmelin and Ewing, the Ninth Circuit's memorandum disposition incorrectly suggested that Petitioner's opinion would not be amenable to a proportionality review under the Eighth Amendment. App. 4.

Consequently, this case – involving a non-violent marijuana grow site tender who was present for only three days and then received a mandatory minimum term of 120 months that was 79 months lengthier than the term to which

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[5] The Ninth Circuit also determined that Petitioner's appellate waiver barred it jurisdictionally from entertaining Petitioner's safety-valve-related claim on the merits. App. 3.

his comparably culpable brother was sentenced (App. 46-47) – provides the Court with an appropriate vehicle to consider the precise contours of proportionality analysis that survived the Harmelin plurality and Ewing. Given that Petitioner is serving a mandatory minimum term (presumably not an uncommon occurrence in the federal criminal justice system under statutory provisions such as 21 U.S.C. §§ 841 and 846), the Court should therefore grant review. Alternatively, to the extent that those opinions appear to foreclose proportionality review altogether – even under the draconian circumstances that Petitioner's case presents – this Court should grant review and consider overruling the Harmelin plurality and Ewing in part. See S. Ct. R. 10(c)

2. Moreover, this case is a strong vehicle for the Court to review the Eighth Amendment question that it presents. Simply put, Petitioner does not have any extant claims other than the one arising from the Eighth Amendment, and the Ninth Circuit has already concluded that Petitioner's appellate waiver does not apply to a constitutional claim regarding his sentence. Thus, should the Court grant certiorari and vacate Petitioner's sentence, all that would remain is for the Ninth Circuit to remand to the district court so that it can apply any new proportionality principles that the Court might enunciate, ones that likely would favor Petitioner strongly given this case's facts.

I. HARMELIN'S PLURALITY AND EWING DID NOT TERMINATE EIGHTH AMENDMENT PROPORTIONALITY REVIEW IN NON-CAPITAL CASES

A. Harmelin involved a defendant in a Michigan state criminal proceeding who "was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole." Harmelin, 501 U.S. at 961. In Part IV of Justice Scalia's opinion – the only portion that commanded five votes – he rejected Harmelin's argument "that a sentence which is not otherwise cruel and unusual becomes so simply because it is mandatory." Id. at 995 (internal quotation marks omitted). Continuing, he noted that the Court has "drawn the line of required individualized sentencing at capital cases, and see[s] no basis for extending it further." Id. at 996. Notably, however, that part of Justice Scalia's opinion did not concern whether Harmelin's sentence was proportional for Eighth Amendment purposes. Id. at 994 ("Petitioner claims that his sentence violates the Eighth Amendment for a reason in addition to its alleged disproportionality.") (emphasis added)).

Writing for himself and two other justices, Justice Kennedy noted that he concurred in Part IV of Justice Scalia's opinion. But he disagreed with Justice Scalia regarding whether the Eighth Amendment contains a proportionality component when assessing a sentence's severity. Harmelin, 501 U.S. 996-97

(Kennedy, J., concurring in part and concurring in the judgment) (plurality). Because this three-justice plurality supplies the narrowest decisional result, it necessarily becomes the controlling opinion. See Marks v. United States, 430 U.S. 188, 193 (1977); see also Ewing, 538 U.S. at 23-24 (deeming the Harmelin plurality opinion to control Eighth Amendment question)

Justice Kennedy explained that an "Eighth Amendment proportionality principle" does "apply[] to noncapital sentences," id. at 997, and it "forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. at 1001 (quoting Solem, 463 U.S. at 288). In announcing that, Justice Kennedy discussed four underlying "principles" (id. at 998) that resulted in the plurality's adopting that controlling rule:

> (1) ". . . the fixing of prison terms for specific crimes involves a substantive penological judgment that as a general matter, is properly within the province of legislatures, not courts"; (2) ". . . the Eighth Amendment does not mandate adoption of any one penological theory"; (3) "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure"; and (4) "proportionality review by federal courts should be informed by objective factors to the maximum possible extent."

Id. at 998-1000 (internal quotation marks omitted)).

Applying those principles to Harmelin's case, Justice Kennedy determined

that because Harmelin had been "convicted of possession of more than 650 grams (over 1.5 pounds of cocaine," that "fe[ll] in a different category than the relatively minor, nonviolent crime at issue in Solem.[6] Possession, use, and distribution of illegal drugs represent one of the greatest problems affecting the health and welfare of our population." Id. at 1002 (internal quotation marks omitted). But notably, Justice Kennedy did not hold that any narcotics offense resulting in a mandatory minimum sentence would survive the plurality's proportionality review under the Eighth Amendment. And he expressed concerns about Harmelin's sentence, noting that "[a] penalty as severe and unforgiving as the one imposed here would make this a most difficult and troubling case for any judicial officer. Reasonable minds may differ about the efficacy of Michigan's sentencing scheme, and it is far from certain that Michigan's bold experiment will succeed." Id. at 1008.

B. Although the present case does not involve a recidivist sentence, within that related context, the Court similarly has not precluded some

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[6] Although the Michigan statute at issue proscribed what Justice Scalia termed "possession" of more than 650 grams of a "mixture" containing cocaine (see id. at 961 & n.1), considering a person who possesses such an amount does not do so for personal use, that state's scheme is roughly comparable to § 841's prohibiting possession of a controlled substance with intent to distribute. See § 841(a)(1).

proportionality review under the Eighth Amendment. Most notably, in Ewing, the petitioner stole golf clubs in California, resulting "in one count of felony grand theft of personal property in excess of $400." Ewing, 538 U.S. at 19. Previously, he "had been convicted . . . of four serious or violent felonies for . . . three burglaries and [a] robbery in [a] Long Beach apartment complex." Id. After the sentencing judge declined either to convert the grand theft conviction into a misdemeanor or "dismiss the allegations of some or all of [the petitioner's] prior serious or violent felony convictions," he sentenced the petitioner under California's "three strikes law to 25 years to life." Id.

On certiorari from the California Supreme Court, the Court applied Justice Kennedy's plurality opinion in Harmelin to the recidivist sentencing context. Id. at 23-24. It noted that the touchstone for such analysis revolves around "not only" Ewing's "current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions." Id. at 29. Noting that Ewing's sentence was "a long one," this Court nevertheless concluded that his was "not 'the rare case in which a threshold comparison of the crime committed and the sentenced imposed leads to an inference of gross disproportionality.'" Id. at 30 (quoting Harmelin, 501 U.S. at 1005 (plurality opinion)).

Much as was true in Harmelin's plurality, however, nothing in Ewing suggested that the majority had foreclosed a defendant who received a lengthy custodial term under a recidivist sentencing regime from invoking proportionality review under the Eighth Amendment.

C. Consequently, the Ninth Circuit panel's analysis here incorrectly presumed – without even examining the full-sweep of the Court's cases, such as Harmelin and Ewing – that Congress' having enacted a mandatory minimum term for marijuana manufacturing that covers even minimal participants such as Petitioner almost necessarily precluded the merits of his as-applied Eighth Amendment proportionality claim. Simply put, in the district court's estimation, Petitioner having fleetingly handled a firearm a day before law enforcement agents converged on the marijuana grow site made him amenable to a custodial term 79 months lengthier than that which his brother – who was present longer at the site than Petitioner (see supra at 10) – received for otherwise substantially similar conduct. See supra at 16-17.

Thus, even if the Court were to decline to overrule cases such as Harmelin and Ewing, Petitioner's case nevertheless conflicts with the proportionality carveouts that the Court has set forth in the Eighth Amendment. And the Court thus should grant Petitioner's petition for a writ of certiorari to emphasize that

Eighth Amendment does indeed place limits on non-proportional, non-capital sentences that trial judges can impose, particularly when there is a gross disparity between sentences meted out to similarly situated co-defendants.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO REVIEW WHETHER PETITIONER'S MANDATORY MINIMUM SENTENCE, SOMETHING THAT RECURS FREQUENTLY UNDER § 841(b)(1)(A)(vii), WITHSTANDS EIGHTH AMENDMENT SCRUTINY.

There are several reasons why this case is a strong vehicle for the Court to expand upon Justice Kennedy's controlling plurality in Harmelin and the majority opinion in Ewing – and, if necessary, overrule those two cases.

A. First, Petitioner's Eighth Amendment claim is the only extant one that has survived throughout his direct appellate efforts. Although he also challenged the district court's denial of safety valve relief, the Ninth Circuit panel deemed Petitioner's appellate waiver provision in his plea agreement to bar that particular claim. App. 3. And because the Ninth Circuit panel otherwise exempted the Eighth Amendment question from the provision because of its constitutional provenance (Id.), the Court now has a clean opportunity to consider it anew.

B. Second, should the Court grant certiorari, the Ninth Circuit on remand would then apply any proportionality principles that the Court might enunciate. Alternatively, the Court were to grant certiorari and reaffirm Harmelin

and Ewing, then Petitioner's direct appellate efforts would be concluded. So, it is clear that whatever the Court decides to do here would be outcome determinative regarding the merits of Petitioner's Eighth Amendment claim.

C. And third, Petitioner would have a strong chance of prevailing on remand to the Ninth Circuit if the Court were – at a bare minimum – to emphasize that a proportionality review must occur whenever a defendant such as Petitioner advances an as-applied challenge to a federal mandatory minimum sentencing provision based on grossly disparate sentences meted out to similarly situated defendants. As even the district court agreed here, the 79-month discrepancy between the mandatory minimum custodial term that Petitioner received and that which the district court imposed on Petitioner's almost-identically culpable brother was intrinsically unjust. Thus, Petitioner – whose only conduct differing from his brother's involved his fleeting handling of a firearm that he did not even own (see supra at 16-17) – would be a strong candidate under a putative proportionality review to prevail on his Eighth Amendment claim.

* * *

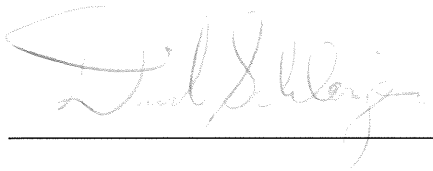
The Court should therefore grant Petitioner's petition for a writ of certiorari.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Dated: March 26, 2024

Respectfully submitted,



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Counsel for Petitioner

No._____

IN THE SUPREME COURT OF THE UNITED STATES

HECTOR MANUEL GOMEZ RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of *Certiorari* to The United States Court of Appeals for the Ninth Circuit

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PROOF OF SERVICE

I, David A. Schlesinger, declare that on March 26, 2024, as required by Supreme Court Rule 29, I served Petitioner Hector Manuel Gomez Rodriguez's MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the petition in the United States mail (Priority, first-class), properly addressed to her, and with first-class postage prepaid.

The name and address of counsel for Respondent is as follows:

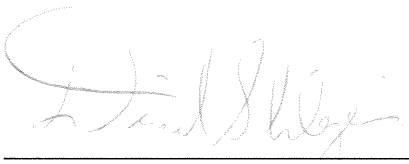
The Honorable Elizabeth B. Prelogar, Esq.
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 5614
Washington, DC 20530-0001
Counsel for Respondent

Additionally, I mailed a copy of the motion and the petition to my client, Petitioner Hector Manuel Gomez Rodriguez, by depositing an envelope containing the documents in the U.S. mail, first-class postage prepaid, and sending it to the following address:

Hector Manuel Gomez Rodriguez
Federal Inmate Register No. 78327-097
USP Lompoc
U.S. Penitentiary
3901 Klein Blvd.
Lompoc, CA 93436

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 26, 2024



DAVID A. SCHLESINGER
Declarant