No. 11-1034

In the Supreme Court of the United States

MEHDI GABAYZADEH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed plain error under the Ex Post Facto Clause by applying the "one-book rule" in Sentencing Guidelines § 1B1.11(b)(3) to related offenses that are considered as a group under the advisory Guidelines.

2. Whether the district court committed plain error under the Ex Post Facto Clause by using a version of the advisory Sentencing Guidelines that became effective after some of petitioner's offenses were completed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-17) is not reported but is available at 428 Fed. Appx. 43.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2011. A petition for rehearing was denied on September 20, 2011 (Pet. App. 30). On December 2, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 17, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to commit securities fraud, in violation of 18 U.S.C. 371; conspiring to commit bank fraud, in violation of 18 U.S.C. 371; bank fraud, in violation of 18 U.S.C. 1344; wire fraud, in violation of 18 U.S.C. 1343; transporting property obtained by fraud, in violation of 18 U.S.C. 2314; bankruptcy fraud, in violation of 18 U.S.C. 152; conspiring to commit perjury, in violation of 18 U.S.C. 371; and obstruction of justice, in violation of 18 U.S.C. 1512(b)(1). Pet. App. 18, 20. The district court sentenced petitioner to serve 180 months in prison, to be followed by five years of supervised release. *Id.* at 20, 22. The court of appeals affirmed. *Id.* at 1-17.

1. Petitioner served as president and chief executive officer of American Tissue Incorporated, a paper company. Gov't C.A. Br. 3. Petitioner and his business partner owned all of the stock in the parent companies of American Tissue. *Ibid.* The company funded its day-to-day operations largely through a revolving credit line provided by LaSalle Bank National Association and a consortium of other financial institutions. *Id.* at 4. The amount of credit available to American Tissue under this "LaSalle Revolver" varied according to a formula tied to American Tissue's accounts receivable and its inventory of unsold paper. *Ibid.* See generally S. App. 4-5 (Presentence Investigation Report (PSR) ¶¶ 3-6).

From July 2000 through August 2001, petitioner and several co-conspirators falsely inflated American Tissue's accounts receivable through fictitious sales and other accounting manipulations, thereby enabling the company to borrow more under the LaSalle Revolver

than it otherwise could have borrowed. S. App. 7-10 (PSR ¶¶ 12-22); Gov't C.A. Br. 5-15. Petitioner also caused American Tissue to file reports with the Securities and Exchange Commission containing information that petitioner knew to be false. S. App. 7 (PSR ¶ 11); Gov't C.A. Br. 16-17. And petitioner sought to repay loans from the LaSalle Revolver through an attempted $400 million bond offering that petitioner falsely claimed was legitimate, even though he knew that American Tissue was "completely insolvent." S. App. 6 (PSR ¶ 10).

In September 2001, American Tissue filed for bankruptcy. Gov't C.A. Br. 20. While the bankruptcy proceeding was pending, petitioner and his co-conspirators continued to misrepresent the company's finances. See S. App. 11-13 (PSR ¶¶ 24-26, 30); Gov't C.A. Br. 20-23, 25-26. In one instance, petitioner falsely claimed ownership of certain expensive equipment in an American Tissue facility that was about to be sold at auction. Gov't C.A. Br. 20-22. On another occasion, petitioner instructed an associate to create a fraudulent bill of sale for a different piece of equipment and to testify falsely in bankruptcy court about it. S. App. 11 (PSR ¶ 24).

2. In January 2005, a grand jury in the Eastern District of New York returned a second superseding indictment charging petitioner with conspiring to commit securities fraud, in violation of 18 U.S.C. 371 (Count One); conspiring to commit bank fraud, in violation of 18 U.S.C. 371 (Count Two); bank fraud, in violation of 18 U.S.C. 1344 (Count Three); wire fraud, in violation of 18 U.S.C. 1343 (Count Four); transporting property obtained by fraud, in violation of 18 U.S.C. 2314 (Count Five); bankruptcy fraud, in violation of 18 U.S.C. 152 (Count Six); conspiring to commit perjury, in violation of 18 U.S.C. 371 (Count Seven); and obstruction of justice,

in violation of 18 U.S.C. 1512(b)(1) (Count Eight). Pet. App. 31-67. Following a two-month jury trial, petitioner was convicted on all eight counts. *Id.* at 18. As reflected in the judgment, petitioner's offenses on Counts One through Three ended by September 2001, while his offenses on Counts Four through Eight ended in 2002. *Id.* at 18, 20. The total financial loss attributable to petitioner's offenses was $193,461,068.10. See S. App. 15 (PSR ¶ 39).

The PSR calculated petitioner's advisory imprisonment range based on the November 2001 version of the Sentencing Guidelines—*i.e.*, the version of the Guidelines in effect at the time that petitioner completed his offense conduct in 2002. S. App. 17 (PSR ¶ 45). Because petitioner's offenses involved substantially the same type of harm and because the applicable offense level was determined largely on the basis of the amount of harm, the PSR grouped all of petitioner's convictions for sentencing purposes. *Id.* at 19 (PSR ¶ 67) (citing Sentencing Guidelines § 3D1.2(c) and (d)). Applying the 2001 guideline for fraud, the PSR started with a base offense level of six. *Id.* at 17 (PSR ¶ 46). After applying enhancements for causing a loss of more than $100 million (26 levels), perpetrating a fraud on more than 50 victims (four levels), undertaking fraudulent actions during the course of a bankruptcy proceeding (two levels), using sophisticated means (two levels), deriving more than $1 million in gross receipts from financial institutions as a result of the offenses (two levels), playing a leadership role in the offenses (four levels), and obstructing justice (two levels), the PSR derived a total offense level of 48. See *id.* at 17-19 (PSR ¶¶ 47-73). Accordingly, petitioner's advisory sentencing range under

the 2001 Guidelines was life imprisonment. *Id.* at 28 (PSR ¶ 104).

Although petitioner objected to various aspects of the PSR's calculations, see First Addendum to PSR at 2-5; 09/25/06 Sent. Tr. 21-42 (Sent. Tr.), petitioner did not contend that the PSR incorrectly used the November 2001 version of the Sentencing Guidelines. Likewise, although petitioner filed a lengthy sentencing memorandum urging the district court to vary downward from the advisory Guidelines sentence of life imprisonment, see 07/10/06 Sent. Mem. 1-87, petitioner did not argue that the Ex Post Facto Clause or any other source of law precluded application of the 2001 version of the Guidelines. Nor did petitioner object to the court's reliance on the 2001 Guidelines at any time during the sentencing hearing. See Sent. Tr. 1-91.

Notwithstanding petitioner's advisory Guidelines sentence of life in prison, the government and the Probation Office both recommended that the district court impose a below-Guidelines sentence of 240 months. See Sent. Tr. 77. Defense counsel urged the court to impose a sentence of 120 months. *Id.* at 46-54. Recognizing that "the [G]uidelines are advisory" (*id.* at 42), and agreeing with petitioner that "just punishment" in his case should "not [be] a life term" (*id.* at 85), the district court sentenced petitioner to serve 180 months in prison. *Id.* at 86. Although the court acknowledged petitioner's age and poor health, *id.* at 84, the court emphasized that petitioner had "stolen millions of dollars" and "created havoc in hundreds of lives," *id.* at 85. The court reasoned that a "significant sentence" of 180 months was the "appropriate term" in view of all of these considerations. *Id.* at 85-86.

3. The court of appeals affirmed in an unpublished summary order. Pet. App. 1-17. As relevant here, the court rejected petitioner's contention, raised for the first time on appeal, that the district court's use of the November 2001 version of the Sentencing Guidelines violated the Ex Post Facto Clause because the 2001 Guidelines did not become effective until after petitioner's offenses on Counts One through Three had already been completed. *Id.* at 16-17; see Pet. C.A. Br. 83-85.

The court of appeals concluded that petitioner's argument was foreclosed by the court's earlier decision in *United States* v. *Kumar*, 617 F.3d 612, 628 (2d Cir. 2010), cert. denied, 131 S. Ct. 2931 (2011). Pet. App. 16. The Sentencing Guidelines' "one-book rule" provides that, "[i]f the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." Sentencing Guidelines § 1B1.11(b)(3). In *Kumar*, which involved pre- and post-amendment offenses that were grouped under the Guidelines, the court of appeals concluded that the one-book rule "does not violate the *Ex Post Facto* clause when applied to the sentencing of offenses committed both before and after the publication of a revised version of the Guidelines." 617 F.3d at 628. In the decision below, the court of appeals refused to depart from *Kumar*, explaining that it was "not persuaded by [petitioner's] arguments that *Kumar* was wrongly decided" and that, in any event, the panel was without authority to disagree with a decision of a prior panel. Pet. App. 16-17.

ARGUMENT

Petitioner renews his contention (Pet. 14-40) that the district court violated the Ex Post Facto Clause by using the November 2001 version of the advisory Sentencing Guidelines under the Guidelines' one-book rule. The court of appeals correctly rejected that contention. Although petitioner identifies a circuit conflict concerning the Ex Post Facto Clause and the Guidelines' one-book rule, that division of authority is a vestige of the mandatory Guidelines era and does not warrant this Court's review. Petitioner, moreover, failed to preserve that issue in the district court, so this Court's review would be for plain error only. Although the circuits are also divided on the question whether changes in the Sentencing Guidelines implicate ex post facto concerns after *United States* v. *Booker*, 543 U.S. 220 (2005), this case would not provide an appropriate vehicle to resolve that question. Petitioner did not address that question at any point in the proceedings below, and neither the district court nor the court of appeals addressed it. Further review is not warranted.

1. a. Because petitioner failed to raise any objection in the district court to the use of the November 2001 Guidelines, see p. 5, *supra*, his arguments are subject to review for plain error only. See Fed. R. Crim. P. 52(b). Although petitioner acknowledges that "the district court did not directly address the one-book rule" (Pet. 13 n.5), he fails to explain that the reason for that omission was petitioner's own failure to object to the court's application of that rule. Citing *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991), petitioner nevertheless contends that "the issue is properly before this Court because the Second Circuit squarely ruled on the one-book issue." Pet. 13 n.5. But *Virginia*

Bankshares did not involve a forfeited objection in a criminal proceeding subject to Fed. R. Crim. P. 52(b), and petitioner is not entitled to relief from his sentence on appeal unless he satisfies the requirements of that rule. See *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (Court has "no authority" to create an "exception" to Rule 52(b)). Because petitioner's challenge to the one-book rule was clearly foreclosed by circuit precedent, the court of appeals had no need to discuss the plain-error standard in rejecting petitioner's claim, nor did the government discuss the standard of review in its appellate brief. See Pet. App. 16-17; Gov't C.A. Br. 72-73. But that does not change the fact that petitioner failed to preserve the principal issue on which he now seeks this Court's review.

b. Under the plain-error standard, petitioner must show (1) an error that (2) is clear or obvious and (3) affects substantial rights and that (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. See *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010). No error occurred here, let alone a plain one.

"[C]entral to the *ex post facto* prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed'" at the time when the defendant committed the acts that triggered that punishment. *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981)). Those concerns are not implicated by applying the one-book rule to offenses, like petitioner's, that are sufficiently related that they are grouped to determine the advisory Guidelines range. See generally Sentencing Guidelines § 3D1.2 (grouping of offenses). A defendant in such cir-

cumstances has fair notice of the likely consequences of his criminal conduct before he commits it.

Although petitioner concedes (Pet. 27) that his offenses were properly grouped under the Sentencing Guidelines, he argues that his earlier offenses must be considered separately because they were factually "distinct as to time and character." Case-specific contentions of that kind do not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). In any event, when offenses are properly grouped under the Guidelines, it is irrelevant for ex post facto purposes whether the defendant's conduct underlying the grouped offenses is similar or "distinct." Grouping depends on whether the offenses in question involve "substantially the same harm," Sentencing Guidelines § 3D1.2, not whether they happen to involve similar conduct. Thus, offenses are commonly grouped where, as here, the defendant engages in fraud and then commits later offenses designed in part to conceal that fraud. See, *e.g.*, *United States* v. *Weiss*, 630 F.3d 1263, 1278-1279 (10th Cir. 2010) (fraud and witness tampering); *United States* v. *Kumar*, 617 F.3d 612, 625-631 (2d Cir. 2010) (fraud and obstruction of justice), cert. denied, 131 S. Ct. 2931 (2011).

As the court of appeals correctly explained in *Kumar*, 617 F.3d at 628, the one-book rule puts the defendant on notice that, if he commits a series of related offenses over time and is prosecuted for those offenses in a single proceeding, the district court will consult the advisory Guidelines in effect when his last offense was completed. Application of the one-book rule to grouped offenses is thus akin to applying the most recent version of the Guidelines to a continuing offense that is begun

under one version of the Guidelines but not completed until a later version has taken effect. As the courts of appeals that have addressed that scenario have recognized, no ex post facto concerns are implicated. See, *e.g.*, *United States* v. *Zimmer*, 299 F.3d 710, 717-718 (8th Cir. 2002), cert. denied, 537 U.S. 1146 (2003). Petitioner's reliance (Pet. 30-31) on *Greenfield* v. *Scafati*, 277 F. Supp. 644 (D. Mass. 1967), aff'd, 390 U.S. 713 (1968), is misplaced. The increased punishment in *Greenfield* was triggered by commission of a parole violation, not an ongoing course of related criminal conduct.

Under the one-book rule, the specific conduct that triggers application of the later version of the Guidelines is the commission of the last offense after the new version of the Guidelines has taken effect. A defendant can avoid any additional criminal liability simply by refraining from committing additional related offenses after a new version of the Guidelines is adopted. Here, for example, petitioner could have avoided the application of the one-book rule by ceasing his fraudulent conduct after American Tissue filed for bankruptcy relief in September 2001. Instead, petitioner continued to misrepresent the company's finances and defraud creditors during the bankruptcy proceeding in 2002. See S. App. 11-13 (PSR ¶¶ 24-26, 30); Gov't C.A. Br. 20-23, 25-26. The district court therefore committed no error, let alone clear or obvious error, in consulting the November 2001 version of the Guidelines to determine petitioner's advisory sentencing range.

c. Although petitioner is correct (Pet. 16-26) that the courts of appeals are divided on the question whether the one-book rule violates the Ex Post Facto Clause when it results in a higher Guidelines range than would have applied under the Guidelines in effect at the

time of the defendant's initial offense, that conflict is a vestige of the era when the Sentencing Guidelines were mandatory and thus implicated the Ex Post Facto Clause. Indeed, many of the decisions that petitioner cites long pre-date *Booker*. See Pet. 17-23. As discussed below (pp. 13-16, *infra*), the Guidelines are now advisory only and thus do not raise ex post facto concerns.

In any event, most of the courts of appeals have held that the one-book rule does not violate the Ex Post Facto Clause where, as in this case, the rule is applied to a series of grouped offenses. See, *e.g.*, *Weiss*, 630 F.3d at 1275-1278; *Kumar*, 617 F.3d at 624-631 (collecting cases from other circuits). The Ninth Circuit has disagreed. See *United States* v. *Ortland*, 109 F.3d 539, 547, cert. denied, 522 U.S. 851 (1997). Petitioner contends (Pet. 23-26) that, by relying on *Kumar*, the court of appeals endorsed the broader proposition that the one-book rule does not violate the Ex Post Facto Clause regardless whether the offenses are grouped under the Guidelines. See *Kumar*, 617 F.3d at 628 (stating without qualification "that the one-book rule set forth in § 1B1.11(b)(3) does not violate the Ex Post Facto clause when applied to the sentencing of offenses committed both before and after the publication of a revised version of the Guidelines"). That broader issue is not presented in this case, however, because petitioner concedes that his offenses were properly grouped. See Pet. 27; see also S. App. 19 (PSR ¶ 67) (discussing grouping of petitioner's offenses). Only the Ninth Circuit has concluded that applying the one-book rule in such circumstances implicates the Ex Post Facto Clause.[1]

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[1] At one point, the Third Circuit agreed with the Ninth Circuit. See *United States* v. *Bertoli*, 40 F.3d 1384, 1404 n.17 (3d Cir. 1994). Recent-

That conflict does not warrant this Court's review. The Court has recently denied review in several cases that presented the same question—including *Kumar*, the case on which the court of appeals relied below (Pet. App. 16-17). See *Kumar*, 131 S. Ct. 2931 (2011) (No. 10-961); see also *Johnson* v. *United States*, 2012 WL 1252776 (Apr. 16, 2012) (No. 11-7857); *Custable* v. *United States*, 131 S. Ct. 1812 (2011) (No. 10-631). The same disposition is warranted here. The existing circuit conflict is predicated on the pre-*Booker* premise that changes in the Guidelines may raise ex post facto concerns. Consequently, a decision addressing that conflict would only have continuing significance if the Court were to conclude that the Ex Post Facto Clause is implicated by changes to the advisory Guidelines. That question, however, is not properly presented in this case. See pp. 13-14, *infra*.

Even if the one-book question otherwise warranted review, moreover, this case would not provide an appropriate vehicle for addressing it. Given the sentence he received, petitioner could not show that any error affected his substantial rights or the fairness or integrity of the proceedings. See *Marcus*, 130 S. Ct. at 2164 (discussing plain-error review). The district court sen-

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ly, however, in *United States* v. *Siddons*, 660 F.3d 699 (2011), the Third Circuit concluded that no ex post facto violation occurs when a court groups "continuing, related conduct" and applies the Guidelines in effect during the "latest-concluded conduct." *Id*. at 704-707. *Siddons* distinguished *Bertoli* on the ground that *Bertoli* involved "discrete, unconnected acts." *Id*. at 707. While the Third Circuit continues to find that the one-book rule violates the Ex Post Facto Clause when the use of a later edition of the Guidelines produces a harsher range and the counts are *not* grouped, see *United States* v. *Saferstein*, 673 F.3d 237, 244 (2012), that holding has no application here, and the recent narrowing of the circuit split further counsels against review.

tenced petitioner to serve 180 months in prison—that is, more than *nine years less* than the minimum advisory sentence of 292 months that petitioner now contends he should have faced (Pet. 12), and five years less than the already below-Guidelines sentence of 240 months recommended by the government and the Probation Office. See Sent. Tr. 77-81. In rejecting petitioner's request for an even lower sentence, the district court explained that a "significant sentence" of 180 months was an "appropriate term" because petitioner had "stolen millions of dollars," "created havoc in hundreds of lives," and "attempted [a] corruption of the courts." *Id.* at 85-86. Petitioner's counsel told the district court (*id.* at 47-54) that *any* substantial prison sentence was functionally a life sentence for petitioner in view of his age and declining health.[2] The court nevertheless found that a sentence of 180 months was "just punishment" for petitioner's conduct. *Id.* at 85. Against this background, there is no reason to believe that the district court would have imposed a shorter sentence even if the court had started with an advisory range of 292-360 months rather than life imprisonment.

2. a. As petitioner observes (Pet. 34-38), the courts of appeals are also divided on the question whether changes to the Sentencing Guidelines implicate ex post facto concerns after *Booker*. That question is not prop-

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[2] See, *e.g.*, Sent. Tr. 47 ("[W]hether the [c]ourt sentences [petitioner] to a 20 year jail sentence, or a 10 year jail sentence, or somewhere in between, it's in effect a death sentence."); *id.* at 53 ("I know the probation department has recommended 20 years and that's well below the guideline sentence, unless you realize that 20 years is 10 years longer than [petitioner's] anticipated life expectancy * * * * ."); see also Pet. 40 (arguing that the 180-month sentence imposed by the district court is already "very close to a life sentence" for petitioner).

erly presented in this case. As already noted (pp. 7-8, *supra*), petitioner failed to raise any ex post facto claim in the district court. Although he sought to raise the one-book issue in his appellate brief, his terse argument (Pet. C.A. Br. 83-85) did not mention the broader question whether the advisory Guidelines may implicate ex post facto concerns, nor did it refer to the existing circuit conflict on that issue. Consequently, neither the district court nor the court of appeals addressed the question. This case therefore would not provide an appropriate vehicle for the Court's review. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is "a court of review, not of first view").

b. In any event, as the government explained in response to the petition for a writ of certiorari in *Kumar* and other cases in which this Court has recently denied review, the Sentencing Guidelines no longer present any ex post facto concerns now that they are advisory only. *Kumar*, 131 S. Ct. 2931 (No. 10-961); see also, *e.g.*, *Johnson*, 2012 WL 1252776 (No. 11-7857); *Custable*, 131 S. Ct. 1812 (No. 10-631); *Sedrati* v. *United States*, 131 S. Ct. 455 (2010) (No. 09-10911); *Hensley* v. *United States*, 130 S. Ct. 1284 (2010) (No. 09-480).

In *Miller* v. *Florida*, this Court held that the Ex Post Facto Clause barred the retroactive application of revised state sentencing guidelines that increased a defendant's presumptive sentencing range compared to the guidelines in effect at the time that the defendant committed the offense. The Court reasoned that the new guidelines, which "ha[d] the force and effect of law," "substantially disadvantaged" the defendant, because the State's guidelines system created a "high hurdle that must be cleared before discretion [could] be exercised" to impose a non-guidelines sentence. 482 U.S. at 432,

435. The Court distinguished the Florida guidelines system from the United States Parole Commission's guidelines, noting that the federal parole guidelines "simply provide flexible 'guideposts' for use in the exercise of discretion." *Id.* at 435.

Before *Booker*, the federal Sentencing Guidelines (unlike the former federal parole guidelines) were mandatory. Thus, like the Florida guidelines at issue in *Miller*, the federal Sentencing Guidelines both "ha[d] the force and effect of laws," *Booker*, 543 U.S. at 234, and significantly constrained district courts' discretion to impose sentences outside of the Guidelines range. See 18 U.S.C. 3553(b)(1). Courts of appeals had therefore uniformly held that, under *Miller*, the Ex Post Facto Clause precluded the application of revised Guidelines provisions that provided for a more severe sentencing range than authorized by the Guidelines in effect when the defendant committed the offense. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994).

After *Booker*, however, the Guidelines, far from having "the force and effect of laws," 543 U.S. at 234, are now only advisory and do not limit the discretion of sentencing courts in any manner akin to the state guidelines at issue in *Miller*. For example, in *Rita* v. *United States*, 551 U.S. 338, 341, 350-354 (2007), the Court held that sentencing courts may not presume that a sentence within the advisory Guidelines range is reasonable or that a sentence outside the range is unreasonable. And in *Gall* v. *United States*, 552 U.S. 38, 47 (2007), the Court held that a court of appeals cannot demand an increasingly strong justification for a sentence the farther the sentence varies from the advisory Guidelines range.

The Court has explained that the Guidelines are merely "one factor among several" that "courts must consider in determining an appropriate sentence." *Kimbrough* v. *United States*, 552 U.S. 85, 90 (2007) (citation omitted). Indeed, the Court has repeatedly affirmed that district courts may vary from the recommended Guidelines range "based solely on policy considerations, including disagreements with the Guidelines." *Id.* at 101; see also *Pepper* v. *United States*, 131 S. Ct. 1229, 1247 (2011) ("[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views."); *Spears* v. *United States*, 555 U.S. 261, 265 (2009) (per curiam). And the Court has held that no advance notice is required when a court imposes a sentence outside the advisory Guidelines range based on the sentencing factors in 18 U.S.C. 3553(a), because defendants no longer have "[a]ny expectation subject to due process protection" that they will receive a sentence within the Guidelines range. *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008). Because the Ex Post Facto Clause does not apply to advisory guidelines that merely "provide flexible 'guideposts' for use in the exercise of discretion," *Miller*, 482 U.S. at 435, changes to the Sentencing Guidelines after *Booker* raise no ex post facto concerns.

c. Consistent with this Court's decisions addressing the Guidelines after *Booker*, the Seventh Circuit held in *United States* v. *Demaree*, 459 F.3d 791 (2006), cert. denied, 551 U.S. 1167 (2007), that the Ex Post Facto Clause does not bar a district court from considering the version of the advisory Guidelines in effect at the time of sentencing, even when the version of the Guidelines in effect at the time of the offense provided for a lower ad-

visory sentencing range. See *id.* at 794-795. Other courts of appeals have disagreed, concluding that the Guidelines continue to implicate the Ex Post Facto Clause even though they are now advisory only. See, *e.g.*, *United States* v. *Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010), cert. denied, 131 S. Ct. 1813 (2011); *United States* v. *Lewis*, 606 F.3d 193 (4th Cir. 2010); *United States* v. *Lanham*, 617 F.3d 873, 889-890 (6th Cir. 2010), cert. denied, 131 S. Ct. 2443 (2011); *United States* v. *Wetherald*, 636 F.3d 1315, 1320-1324 (11th Cir.), cert. denied, 132 S. Ct. 360 (2011); *United States* v. *Turner*, 548 F.3d 1094, 1099-1100 (D.C. Cir. 2008).

Although it may be appropriate for this Court to resolve that broader question in an appropriate case, this is not such a case. As already noted (pp. 13-14, *supra*), petitioner failed to raise this issue at any point in the proceedings below, and neither the district court nor the court of appeals addressed it. Petitioner urges that the Court should nevertheless decide the issue in "the interest of effective judicial administration" (Pet. 33). But this Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Petitioner identifies no persuasive reason to depart from that principle here.

Given the substantial downward variance approved by the district court, moreover, petitioner could not prevail even under the test endorsed by several circuits, including the Second Circuit, for evaluating ex post facto claims after *Booker*. See *Ortiz*, 621 F.3d at 87-88 (holding that a sentence imposed under an amended advisory Guideline may violate the Ex Post Facto Clause if there is a "substantial risk" that the court would have imposed a lower sentence under the pre-amendment Guideline,

but finding no such risk where the defendant had already received a significant downward variance). Review is not warranted in a case in which petitioner's legal theory, even if accepted, would have no effect on the court of appeals' determination that his rights were not violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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