No. 10-631

In the Supreme Court of the United States

FRANK CUSTABLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated the Ex Post Facto Clause of the Constitution by applying the version of the advisory Sentencing Guidelines in effect at the time of sentencing.

2. Whether, under plain-error review, petitioner is entitled to relief based on his claim that the one-book rule in Sentencing Guidelines § 1B1.11(b)(3), which requires that the revised edition of the Sentencing Guidelines be used to calculate the advisory sentencing range when the defendant's offenses occurred both before and after the revised Guidelines took effect, violates the Ex Post Facto Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 615 F.3d 824.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2010. The petition for a writ of certiorari was filed on November 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343; securities fraud, in violation of 18 U.S.C. 77x; obstruction of justice, in violation of 18 U.S.C. 1503(a) and 1505; and criminal contempt of court, in violation of 18 U.S.C. 401(3). He was sentenced to 262 months of

imprisonment, to be followed by three years of supervised release. Pet. App. 16-19. The court of appeals affirmed. *Id.* at 1-12.

1. Between April 2001 and June 2002, petitioner orchestrated and executed a fraudulent scheme to acquire stock in publicly traded companies that were experiencing financial difficulties, stimulate the market for the stock through misleading mass marketing, and sell the stock at a profit. Petitioner used two fraudulent methods to acquire the stock. Under one of the methods, petitioner or an entity he controlled paid the companies cash in exchange for which the companies issued shares to individuals whom he designated. Petitioner caused the companies to file Form S-8 registration statements with the Securities and Exchange Commission (SEC) that falsely represented that the designees were providing consulting services in exchange for the shares. Under the other method, petitioner had the companies issue unregistered shares to individuals, who then transferred the shares to petitioner or his designees. To create the appearance that the shares were exempt from registration under SEC Rule 144, petitioner had his attorneys prepare documentation falsely indicating that the shares were issued to satisfy debts that had arisen more than two years earlier. Pet. App. 29-39.

Once petitioner or his designees had acquired the shares, petitioner had co-defendant Sara Wetzel deposit them in brokerage accounts under her name and the names of others. This arrangement allowed petitioner to maintain control of the shares while avoiding SEC reporting obligations that attach when an individual holds significant percentages of a company's stock. Petitioner also sought to stimulate the market's interest in the companies' shares, which was low because the companies were facing financial difficulties. To that end,

petitioner hired a college student, Jesse Boskoff, to send out thousands of unsolicited e-mail messages containing materially false and misleading information about the companies. Petitioner then caused the stock to be sold at artificially inflated prices. Pet. App. 39-43.

In early 2002, petitioner and his attorney, Robert Luce, learned that the SEC had initiated an investigation into petitioner's fraudulent scheme. Petitioner told Luce that he was concerned that one of the individuals who had participated in the scheme would cooperate with the SEC. Luce stated that he would defuse the investigation by telling the SEC that he was that individual's attorney and that the individual would assert his Fifth Amendment right against self-incrimination if questioned. Petitioner agreed to that plan knowing that Luce was not the individual's attorney. Pet. App. 43-44.

In March 2003, based on its investigation, the SEC filed a civil securities-fraud suit against petitioner in the Northern District of Illinois. On March 23, 2008, petitioner was served with an asset-freeze order. The order, entered by a federal district judge, barred petitioner, Wetzel, and a company petitioner controlled from transferring, concealing, or otherwise dissipating any property possessed by any of them. Three days later, petitioner withdrew $10,000 from the operating account of his company, deposited the funds into an account he controlled, and used the funds to pay personal expenses. Petitioner also instructed Wetzel to withdraw funds from company accounts that he knew to have been frozen by the court order. Pet. App. 44-45.

2. In April 2005, a grand jury in the Northern District of Illinois returned a 23-count indictment charging petitioner, two of his companies, and eight co-defendants with wire fraud, in violation of 18 U.S.C. 1343; mail fraud, in violation of 18 U.S.C. 1341; securities fraud, in

violation of 15 U.S.C. 77x; obstruction of justice, in violation of 18 U.S.C. 1503(a) and 1505; and criminal contempt of court, in violation of 18 U.S.C. 401(3). Pet. 6; Pet. App. 2. In July 2008, petitioner pleaded guilty, without a plea agreement, to 15 counts of wire fraud, two counts of securities fraud, two counts of obstruction of justice, and one count of criminal contempt of court. Pet. App. 16-18, 29. Petitioner's "Declaration in Support of His Plea of Guilty" set forth the factual basis for the charges and noted petitioner's position that his sentence should be calculated under the 2001 version of the United States Sentencing Guidelines. *Id.* at 45-48.

3. a. The Presentence Investigation Report (PSR) calculated petitioner's recommended sentencing range using the 2008 version of the Guidelines, the version in effect at the time of petitioner's sentencing. PSR 8 (citing *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007)).[1] To calculate petitioner's offense level, the PSR divided his convictions into two groups, one containing the fraud and contempt counts and the other containing the obstruction-

[1] The 2001 and 2008 Guidelines differ in only one respect relevant to petitioner's case. Although both versions prescribe a four-level enhancement for crimes involving 50 or more victims, Guidelines § 2B1.1(b)(2)(B), the 2008 Guidelines provide an additional two-level enhancement—a total enhancement of six levels—if the victims number 250 or more. Guidelines § 2B1.1(b)(2)(C). The Sentencing Commission added the additional enhancement via an emergency amendment, effective January 25, 2003. See Guidelines App. C, amend. 647. Petitioner notes (Pet. 4-5) that another amendment, effective November 1, 2003, provides for an increase in the base offense level for fraud offenses from six to seven under specified circumstances. See Guidelines App. C, amend. 653 (adding Guidelines § 2B1.1(a)(1)). That amendment is not relevant to petitioner's case, however, because his case does not present the circumstances that trigger the one-level increase, as both petitioner and the government explained in their court of appeals briefs. See p. 8, *infra*.

of-justice counts. PSR 8. Because the fraud group produced "the highest offense level," see Guidelines § 3D1.3, the PSR used that group to determine the advisory range. The PSR started with a base offense level of 7 because the statutory maximum for one of petitioner's convictions (contempt) was more than 20 years. PSR 9 (citing Guidelines § 2B1.1(a)(1)). Based on enhancements for causing a loss of more than $2.5 million (18 levels), perpetrating a fraud on more than 250 victims (6 levels), playing a leadership role in the offense (4 levels), using sophisticated means (2 levels), violating a judicial order (2 levels), and obstructing justice (2 levels), the PSR determined that petitioner's adjusted offense level was 41. PSR 9-13. The PSR then applied a reduction of 3 levels because petitioner had accepted responsibility by pleading guilty, yielding a total offense level of 38. PSR 15-16.

The PSR determined that petitioner was in criminal history category II, based on his conviction in 2005 for obstructing justice (by making false statements regarding his ability to pay a fine imposed in a previous SEC enforcement action). PSR 17. Accordingly, petitioner's advisory sentencing range under the 2008 Guidelines was 262 to 327 months. PSR 29.

The PSR stated that the advisory range would have been lower under "the November 2002 guideline manual in effect during the commission of the offense." PSR 29. Under the 2002 Guidelines, the PSR estimated, petitioner's total offense level would have been 35 and his advisory range would have been 188 to 235 months.[2]

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[2] The PSR's estimate was inaccurate in two respects. First, it failed to take into account the emergency amendment, effective January 25, 2003, adding the six-level enhancement for a crime involving more than 250 victims. See PSR 29; note 1, *supra*. As petitioner concedes (Pet. 37), that amendment was in effect at the time he committed his con-

b. In his sentencing memorandum, petitioner restated his position that the 2001 Guidelines should be used to calculate his advisory sentencing range. 05-cr-00340 Docket entry No. 338, at 2-4 (N.D. Ill. May 8, 2009) (Dkt. No. 338). At his sentencing hearing on May 14, 2009, however, petitioner objected only to the amount of loss used in determining his offense level and to the two-level enhancement for violating a judicial order. Dkt. No. 407, at 7, 17. The district court heard argument on those objections, overruled them, and asked whether there were "[a]ny other legal issues that the defense wishes to address[.]" *Id.* at 22. Counsel replied that all such issues would "be addressed in [his] remarks under [18 U.S.C.] 3553(a)." *Ibid.* After hearing a lengthy presentation from defense counsel and a statement by petitioner, the district court postponed its sentencing ruling to consider the matter further. The court explained that it needed additional time "to think in terms of [section] 3553[,] * * * in terms of the guidelines [and] * * * in terms of the very positive things" the court had "heard about the defendant." *Id.* at 84.

When the sentencing hearing reconvened the following month, the district court sentenced petitioner to 262 months of imprisonment, to be followed by three years of supervised release. Pet. App. 67-68. The court acknowledged that the advisory Guidelines range was "quite high," that petitioner had accepted responsibility

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tempt and obstruction offenses in the spring of 2003. Second, the PSR failed to take into account Guidelines § 3D1.4(b), which provides for a one-level increase when a defendant commits multiple groups of offenses and the offense level applicable to one group is between five and eight levels lower than the other group. See Pet. App. 5; p. 9, *infra*. Correctly calculated, petitioner's total offense level and advisory range under the 2002 Guidelines would have been the same as his total offense level and advisory range under the 2008 Guidelines applied by the district court. See *ibid.*

by pleading guilty, and that he had cooperated extensively with the government. *Id.* at 63. The court determined, however, that those factors were outweighed by petitioner's role as "the mastermind behind the [fraud] scheme" and the nature of the offenses, which were "well-thought-out crime[s] that took place over several years and required a great deal of planning and precise execution." *Id.* at 63-64. The court also stressed that petitioner had not "learn[ed] from past mistakes," as evidenced by the fact that he committed the instant offenses after previous securities violations that had resulted in actions by the SEC and other federal and state bodies. *Id.* at 65. After petitioner's counsel asked why the court had not varied below the Guidelines based on petitioner's "cooperation nor any of the 3553(a) factors," the court reiterated that it had "take[n] all of those matters into consideration." *Id.* at 69-71. The court stated that it "simply [could not] ignore [petitioner's] role" as the mastermind of the scheme and that it therefore believed that "the guideline sentence is the appropriate sentence in this case." *Id.* at 71.

c. Three days after his sentencing, petitioner filed a motion to correct his sentence under Federal Rule of Criminal Procedure 35(a). As relevant here, he argued that the district court had violated the Ex Post Facto Clause by calculating his advisory range under the 2008 Guidelines rather than the 2001 Guidelines. Dkt. No. 352, at 1-2 (June 12, 2009). The government opposed the motion, asserting that petitioner had conceded that his ex post facto claim was foreclosed by circuit precedent and that, in any event, his claim was based on the erroneous view that the 2001 Guidelines were in effect at the time of his offenses of conviction. The government pointed out that the PSR had identified the 2002 Guidelines as the version in effect during the

commission of the offenses and that petitioner had not "contest[ed] this section of the PSR" at sentencing. Dkt. No. 354, at 2 & n.2 (June 15, 2009).

The district court denied the Rule 35 motion, ruling that petitioner's ex post facto claim was foreclosed by the Seventh Circuit's decision in *Demaree*, *supra*. Pet. App. 14. The court reaffirmed that, "[a]s with all of the factors raised by [petitioner]," the court had "fully considered [his] argument under § 3553 in arriving at a sentence that was sufficient but not greater than necessary to serve the purposes of sentencing." *Id.* at 15.

4. The court of appeals affirmed petitioner's sentence. Pet. App. 1-12. Petitioner first argued, and the government agreed, that the district court had erred in calculating petitioner's Guidelines range because his base offense level should have been 6 under Guidelines § 2B1.1(a)(2), rather than 7 under Guidelines § 2B1.1(a)(1), as determined by the PSR and the district court. Pet. C.A. Br. 15-18; Gov't C.A. Br. 22-26. Section 2B1.1(a)(1) provides for an increase in the base offense level for fraud offenses from 6 to 7 if "the defendant was convicted of an offense referenced to [Guidelines § 2B1.1]" and that offense "has a statutory maximum term of imprisonment of 20 years or more." As petitioner and the government explained, that provision does not apply to petitioner because when he committed his fraud offenses, the statutory maxima for those offenses was less than 20 years, and, although the maximum for his contempt offense exceeded 20 years, that offense is not "referenced to" Guidelines § 2B1.1 but to Guidelines § 2J1.1. See Pet. C.A. Br. 15; Gov't C.A. Br. 24-25; Guidelines § 2B1.1 comment. (n.2(A)); Guidelines § 1B1.2(a); Guidelines App. A.

The court of appeals assumed that the district court had erred in calculating petitioner's offense level, but found that a remand was not warranted because "any error [wa]s harmless." Pet App. 5. The court explained that the one-level reduction identified by the parties would "trigger" the one-level increase to a defendant's total offense level that applies when the defendant is sentenced for two groups of offenses, one of which is between five and eight offense levels "less serious" than the other. *Id.* at 6 (citing Guidelines § 3D1.4(b)). This one-level increase, the court reasoned, would "negat[e] any reduction in the Guideline range." *Ibid.*[3]

After rejecting two of petitioner's other challenges to his sentence, the court of appeals "dispose[d] of" petitioner's argument that the district court's use of the 2008 Guidelines in calculating his sentence violated the Ex Post Facto Clause of the Constitution. Pet. App. 8. The court held that petitioner's argument was "foreclosed by" its previous decision in *Demaree*, *supra*, which had "held that, because the Guidelines are only advisory in nature, a court's use of a later version does not offend" the Ex Post Facto Clause. *Id.* at 9. The court noted that it had repeatedly adhered to that reasoning and found "no reason to abandon that conclusion today." *Ibid.*

ARGUMENT

Petitioner principally contends (Pet. 10-40) that the district court's use of the 2008 edition of the Guidelines to calculate his advisory sentencing range violated the

[3] In applying the one-level increase, the court of appeals necessarily rejected alternative grouping methods proposed by petitioner and the government, such as a single grouping for all offenses, that would not have produced the one-level increase. The petition does not challenge that determination, and the government likewise accepts the determination as law of the case.

Ex Post Facto Clause of the United States Constitution. He argues that this Court should grant review to resolve a disagreement among the courts of appeals on whether the advisory Guidelines implicate the Ex Post Facto Clause. Although the courts of appeals are divided on that question, this case is not an appropriate one in which to resolve the issue. Petitioner's ex post facto claim rests on the premise that the Guidelines in effect at the time of his sentencing prescribed a harsher penalty than the Guidelines in effect at the time of his offense conduct. But that premise depends on the Court's resolving in petitioner's favor a second and separate issue—whether Guidelines § 1B1.11(b), which requires use of the revised edition of the Guidelines to calculate the advisory range when a defendant's offenses occur both before and after revised Guidelines take effect, itself violates the Ex Post Facto Clause. That separate issue was neither presented in nor addressed by the courts below, and petitioner could not prevail on that issue under the plain-error standard that would apply in this Court. The Court should therefore deny the petition for a writ of certiorari.[4]

1. As the government has explained in response to other recent petitions for writs of certiorari raising the issue, applying the advisory Guidelines in effect when a defendant is sentenced does not raise ex post facto concerns, even if those Guidelines recommend a higher sentence than the Guidelines that were in effect when the defendant committed the offense. See, *e.g.*, U.S. Br. in Opp. 9-14, *Hensley* v. *United States*, 130 S. Ct. 1284 (2010) (No. 09-480), 2010 WL 603304, at *6-*9. In *Miller* v. *Florida*, 482 U.S. 423 (1987), this Court held that the Ex Post Facto Clause barred the retroactive application

[4] The first question presented is also presented by *Ortiz* v. *United States*, petition for cert. pending, No. 10-7719 (filed Nov. 24, 2010).

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 system created a "high hurdle that must be cleared before discretion [could] be exercised" to impose a non-guidelines sentence. *Id.* 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 *United States* v. *Booker*, 543 U.S. 220 (2005), 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," *id.* 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 applying revised Guidelines provisions that provided for a more severe sentence 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).

This Court's recent decisions explaining the role of the Guidelines in post-*Booker* sentencing, however, have made clear that the Guidelines, far from having the force and effect of laws, are now only advisory and do not limit the discretion of sentencing courts in the manner that the guidelines at issue in *Miller* did. In *Rita* v. *United*

States, 551 U.S. 338, 341, 350-354 (2007), the Court held that sentencing courts cannot presume a sentence within the advisory Guidelines range to be reasonable and cannot presume a sentence outside of the advisory range to be unreasonable. In *Gall* v. *United States*, 552 U.S. 38, 47 (2007), the Court held that a court of appeals cannot apply a "rigid mathematical formula" that would demand an increasingly strong justification the farther a sentence varies from the advisory Guidelines range. And, in subsequent decisions, the Court has made clear both that sentencing courts may vary from the advisory range "based solely on policy considerations, including disagreements with the Guidelines," and that the Guidelines are just "one factor among several" that "courts must consider in determining an appropriate sentence." *Kimbrough* v. *United States*, 552 U.S. 85, 90, 101 (2007) (citation omitted); see *Pepper* v. *United States*, No. 09-6822 (Mar. 2, 2011), slip op. 23 ("[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*, 129 S. Ct. 840, 843 (2009) (per curiam). Finally, the Court has held that no notice is required when a court sentences outside the advisory 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).

Consistent with this Court's recent decisions, the Seventh Circuit held in *United States* v. *Demaree*, 459 F.3d 791, 794-795 (2006), cert. denied, 551 U.S. 1167 (2007), that the Ex Post Facto Clause does not bar the application of 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 advisory sentencing range. And the court below correctly concluded that *Demaree* forecloses petitioner's ex post facto claim. Pet. App. 9.

As petitioner notes (Pet. 12-23), four other circuits—the Second, Fourth, Sixth, and the District of Columbia Circuits—have rejected the analysis in *Demaree* and concluded that the Guidelines continue to implicate the Ex Post Facto Clause even though they "are now advisory" only, *Kimbrough*, 552 U.S. at 101 (citation omitted). See *United States* v. *Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010), petition for cert. pending, No. 10-7719 (filed Nov. 24, 2010); *United States* v. *Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States* v. *Lanham*, 617 F.3d 873, 889-890 (6th Cir. 2010); *United States* v. *Turner*, 548 F.3d 1094, 1099-1100 (D.C. Cir. 2008). The remaining seven courts of appeals with criminal jurisdiction, however, have not yet resolved the issue.[5]

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[5] The Fifth, Eighth, and Eleventh Circuits have expressly stated that the issue remains open in their courts. See *United States* v. *Marban-Calderon*, No. 09-40207, 2011 WL 135040, at *1 (5th Cir. Jan. 18, 2011); *United States* v. *Deegan*, 605 F.3d 625, 632 (8th Cir. 2010); *United States* v. *Fowler*, 342 Fed. Appx. 520, 523 (11th Cir. 2009), cert. denied, 130 S. Ct. 2371 (2010). The First Circuit has also declined to "take sides in the inter-circuit conflict," instead adopting a non constitutional "protocol" that district courts should apply the Guidelines in effect at the time of the offense if they are more favorable to the defendant. *United States* v. *Rodriguez*, 630 F.3d 39, 42 (2010). The Third, Ninth, and Tenth Circuits have assumed that the Ex Post Facto Clause continues to limit application of amended Guidelines even under the advisory system, but those courts have not actually decided the issue. To the extent that petitioner suggests (Pet. 12, 15) that the Third Circuit has resolved the issue, he is incorrect. In the published Third Circuit decision on which petitioner relies (Pet. 15), *United States* v. *Wood*, 486 F.3d 781, 790-791, cert. denied, 552 U.S. 855 (2007), the court of appeals accepted the government's concession that the district court had applied the

2. Whether or not this Court's resolution of the circuit conflict might be warranted in an appropriate case, this case is not a suitable one in which to resolve the issue, for two reasons: first, the record suggests that petitioner would likely have received the same sentence even if the district court had used the 2001 Guidelines to calculate his advisory sentencing range; and, second, determining whether petitioner's advisory range under the Guidelines in effect at sentencing was in fact higher than the advisory range under the Guidelines in effect at the time of his offense would require the Court to resolve an antecedent constitutional question that was not presented in or decided by the courts below.

a. As an initial matter, this case is not an appropriate vehicle to address petitioner's ex post facto claim because the district court's explanation of its sentencing decision indicates that the court would have imposed the same sentence even if it had used the 2001 Guidelines as petitioner requested. Under those Guidelines, petitioner's offense level would have been 36 and his advisory sentencing range would have been 210 to 262 months of imprisonment.[6] The 262-month term that the

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wrong version of the Guidelines, but the appellate court did not itself decide the ex post facto question.

[6] Under the 2001 Guidelines, petitioner's base offense level for the fraud offense grouping would have been 6. See Sentencing Guidelines § 2B1.1(a). After enhancements of 18 levels for causing a loss of more than $2.5 million (*id.* § 2B1.1(b)(1)(J)), 4 levels for perpetrating a fraud on more than 50 victims (*id.* § 2B1.1(b)(2)(B)), 2 levels for violating a court order (*id.* § 2B1.1(b)(7)(C)), 2 levels for using sophisticated means (*id.* § 2B1.1(b)(8)(C)), 4 levels for a leadership role in the offense (*id.* § 3B1.1(a)), and 2 levels for obstruction of justice (*id.* § 3C1.1), his adjusted offense level would have been 38. Because that offense level is within 5 levels of the adjusted offense level of 32 for the obstruction grouping (see *id.* §§ 2J1.2(c)(1), 2X3.1(a), 3B1.1(a)), the grouping enhancement of 1 level identified by the court of appeals would apply (see

district court imposed would thus remain within the advisory range, and the sentencing record provides no indication that the court would have imposed a lower sentence. The court heard extensive arguments from petitioner in support of a sentence of less than 262 months, acknowledged both the severity of that sentence and the value of petitioner's cooperation, and still determined that a 262-month term of imprisonment was "sufficient but not greater than necessary to comply with the purposes" of sentencing set forth in 18 U.S.C. 3553(a). Pet. App. 62, 71; see *id.* at 15. Indeed, the court adhered to that determination even after petitioner's counsel questioned the court about its refusal to impose a lower sentence and filed a post-sentencing motion seeking to reduce petitioner's sentence on two additional grounds. See *id.* at 15, 69-71.

The district court stated that it believed a sentence within the Guidelines range was "the appropriate sentence in this case." Pet. App. 71. Unlike with co-defendant Christine Favara, however, the court did not indicate an "intent" to sentence petitioner at the low end of the Guidelines range, whatever that range was. See *id.* at 10 (explaining that the district judge adjusted Favara's sentence to reflect the low end of the Guidelines range as corrected following an initial error in calculation). The court instead specifically found that a term of 262 months was "sufficient but not greater than necessary to serve the purposes of sentencing," *id.* at 15, 62, and based that conclusion on the severity of peti-

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Pet. App. 5; Guidelines § 3D1.4(b)). That enhancement, combined with a reduction of 3 levels for acceptance of responsibility and a timely guilty plea (Guidelines § 3E1.1), would yield a total offense level of 36. Combined with petitioner's criminal history category of II, that offense level would produce an advisory range of 210 to 262 months of imprisonment. See *id.* Ch. 5, Pt. A (Sentencing Table).

tioner's offense conduct, his role as the "mastermind" of the fraud scheme, and his commission of the instant offenses after previous securities law violations, *id.* at 63-66. The record thus strongly suggests that the court would have imposed the same 262-month sentence whether that sentence was at the low end or the high end of the advisory Guidelines range.

b. This case is a poor vehicle for addressing petitioner's ex post facto claim for another reason as well. Petitioner's claim is based on the premise that the 2008 Guidelines applied by the district court yielded a higher advisory range than the Guidelines in effect at the time of his offense conduct, which petitioner suggests were the 2001 Guidelines. Pet. 7, 38-39. That premise would only be correct, however, if the Court resolved in petitioner's favor a separate, threshold issue that has itself divided the circuits but that was not raised in or addressed by the courts below.

i. Petitioner's offense conduct straddled two different versions of the Guidelines. He pleaded guilty not only to wire and securities fraud, based on his conduct in 2001 and 2002, but also to obstruction of justice and contempt of court, based on actions he took in March and April of 2003. Although the 2001 Guidelines were in effect when petitioner committed the wire and securities fraud offenses, the 2002 Guidelines, as amended by the January 25, 2003 emergency amendment, were in effect when petitioner committed the contempt and obstruction offenses. See Pet. 37 (conceding that fact). Guidelines § 1B1.11(b)(3) tells sentencing courts what to do in those circumstances (to the extent the courts are using the Guidelines in effect at the time of the offense, rather than those in effect at sentencing). That provision instructs courts to apply "the revised edition of the Guidelines Manual * * * to both [sets of] offenses." Guide-

lines § 1B1.11(b)(3). Commonly called the "one-book rule," the provision thus requires sentencing courts to determine the offense level for all counts of conviction using the Guidelines "manual in effect at the time the last offense of conviction was completed." *Id.* § 1B1.11 comment. (backg'd.).

Petitioner would not have been subject to a more favorable advisory sentencing range under the Guidelines "in effect at the time the last offense of conviction was completed." Guidelines § 1B1.11 comment. (backg'd.). Under the 2002 Guidelines as amended, petitioner would have been subject to the same set of offense-level enhancements contained in the 2008 Guidelines—including the increase of 6 levels for a fraud against more than 250 victims, Guidelines § 2B1.1(b)(2)(C), which forms the basis for his ex post facto claim. See Pet. 4; Pet. App. 9. Petitioner's base offense level under the 2002 Guidelines as amended would have been six, which the parties agreed on appeal (and the court of appeals accepted arguendo) was also the correct base offense level under the 2008 Guidelines. See pp. 8-9, *supra;* Pet. App. 4–6. But, under the 2002 Guidelines, as under the 2008 Guidelines, petitioner would also have been subject to the one-level increase under the grouping rules that the court of appeals identified. See Pet. App. 5-6; Guidelines § 3D1.4(b). The upshot is that petitioner would have faced the same total offense level (38) and the same advisory sentencing range (262 to 327 months) under the amended 2002 Guidelines as under the 2008 Guidelines used by the district court. See note 2, *supra*.

ii. The only way that petitioner can avoid that result, and establish that he faced a less-favorable advisory range under the 2008 Guidelines, is to show that the one-book rule in Guidelines § 1B1.11(b)(3) cannot be applied

to him. Petitioner urges the Court (Pet. 33-40) to reach that conclusion, arguing that application of the one-book rule would itself violate the Ex Post Facto Clause.

Petitioner did not, however, present that argument in the district court or the court of appeals, and neither of those courts addressed it. On the contrary, in the district court, petitioner did not object to the PSR's statement that the 2002 Guidelines were the ones "in effect during the commission of the offense." PSR 29. Nor, following his motion to correct his sentence, did petitioner respond to the government's arguments that the PSR was correct on this point and that petitioner had failed to object to the relevant portion of the PSR at the sentencing hearings. See Dkt. No. 354, at 2 n.2 (June 15, 2009). In his brief to the court of appeals, petitioner even recited the PSR's statement that the 2002 Guidelines were the ones in effect during the commission of his offenses, although he also repeated the PSR's erroneous estimate that the offense level under the 2002 Guidelines would have been 35. Pet. C.A. Br. 36; see note 2, *supra* (explaining errors in PSR's offense-level estimate under 2002 Guidelines).

To decide whether the factual premise for petitioner's principal claim is correct, therefore, the Court would have to address a threshold constitutional question that was not raised in or resolved by the courts below. This Court is, however, one "of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it does not ordinarily address issues that were neither pressed nor passed upon in the court of appeals, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The Court should therefore decline to consider petitioner's challenge to the one-book rule.

iii. Resolution of that challenge is especially unwarranted because, by failing to raise the challenge in the

district court or the court of appeals, petitioner forfeited his constitutional claim. The challenge to the one-book rule would thus be reviewed only for plain error. See Fed. R. Crim. P. 52(b). Petitioner would have to show that applying the amended 2002 Guidelines in his case would be error; that the error is clear or obvious; that the error affected his substantial rights; and that the error seriously affected the fairness, integrity, or public reputation of the proceedings. See *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010). Petitioner could not make that showing.

Petitioner could not show any effect on his substantial rights because, for the reasons described above, the district court would not have imposed a lower prison term even if the court had used the 2001 version of the Guidelines. See pp. 14-16, *supra*. And petitioner could not show that any error in applying the amended 2002 Guidelines under the one-book rule would be clear or obvious. As petitioner points out (Pet. 35), the courts of appeals are divided on the question of whether the one-book rule violates the Ex Post Facto Clause.[7] In those

[7] Compare *United States* v. *Kumar*, 617 F.3d 612, 628 (2d Cir. 2010) (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"), petition for cert. pending, No. 10-961 (filed Jan. 24, 2011); *United States* v. *Duane*, 533 F.3d 441, 449 (6th Cir. 2008) (same); *United States* v. *Sullivan*, 255 F.3d 1256, 1262-1263 (10th Cir. 2001) (same), cert. denied, 534 U.S. 1166 (2002); *United States* v. *Lewis*, 235 F.3d 215, 218 (4th Cir. 2000) (same), cert. denied, 534 U.S. 814 (2001); *United States* v. *Vivit*, 214 F.3d 908, 919 (7th Cir.) (same), cert. denied, 531 U.S. 961 (2000); *United States* v. *Kimler*, 167 F.3d 889, 893-895 (5th Cir. 1999) (same); *United States* v. *Bailey*, 123 F.3d 1381, 1404-1407 (11th Cir. 1997) (same); and *United States* v. *Cooper*, 35 F.3d 1248, 1251-1252 (8th Cir. 1994) (same), vacated, 514 U.S. 1094 (1995), reinstated, 63 F.3d 761, 762 (8th Cir. 1995), with *United States* v. *Ortland*, 109 F.3d 539, 547 (9th Cir.) (one-book rule violates the Ex Post Facto Clause where defendant's "sen-

circumstances, an error cannot be clear or obvious. See, *e.g.*, *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error when there is no controlling case law and circuits are split); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006); see also *United States* v. *Castillo-Estevez*, 597 F.3d 238, 241 (5th Cir.) (where circuits divided on merits of ex post facto challenge, the case law revealed a "reasonable dispute" about issue and precluded a finding of plain error), cert. denied, 131 S. Ct. 457 (2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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tence on earlier, completed counts [is] increased by a later Guideline"), cert. denied, 552 U.S. 851 (1997); *United States* v. *Bertoli*, 40 F.3d 1384, 1404 (3d Cir. 1994) (same), cert. denied, 517 U.S. 1137 (1996).