No._____

In the Supreme Court of the United States

DAVID HOUSTON VARGAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Supreme Court for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court's failure to follow the plain language of the Sentencing Guidelines constitutes an incorrect application of the Sentencing Guidelines.

RELATED PROCEEDINGS

United States v. Vargas, No. 22-1400, 2024 WL 706842 (10th Cir. Feb. 21, 2024)

United States v. Vargas, No. 1:21-cr-00024-RBJ-1 (D. Colo. 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Vargas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The panel decision of the court of appeals is available in the Westlaw database at 2024 WL 706842 and reprinted in the Appendix to the Petition ("Pet. App.") at 2a-10a. The Tenth Circuit's order denying en banc review is reprinted at Pet. App. 11a. The relevant proceedings in the district court are unpublished.

JURISDICTION

The panel decision of the court of appeals was issued on February 21, 2024. Pet. App. 2a-10a. On April 30, 2024, the Tenth Circuit denied en banc review. *Id.*, 11a. On July 25, 2025, this Court extended the time to file a petition for a writ of certiorari to August 28, 2024. See No. 24-A-85. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Sentencing Guideline § 2B3.1 states, in pertinent part:

§ 2B3.1. Robbery.

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics: (4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

§ 2B3.1(a), (b)(4).

United States Sentencing Guideline §1B1.1 states in pertinent part:

§ 1B1.1. Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

(L) "Physically restrained" means the forcible restraint of the victim such as by being tied, bound, or locked up.

§ 1B1.1(a) and cmt. n.1(L).

INTRODUCTION

Every federal sentence begins with the Sentencing Guidelines. *Gall v. United States*, 552 U.S. 38 (2007). A sentence is per se unreasonable if the Guideline calculation is incorrect. *Rosales-Mireles v. United States*, 585 U.S. 129 (2018). That is because, most of the time, such "obvious judicial error[s]" will seriously affect the fairness, integrity, or public reputation of judicial proceedings by threatening to "allow[ ] individuals to linger longer in prison than the law requires[.]" *Hicks v. United States,* 582 U.S. 924, 137 S.Ct. 2000, 2001 (2017) (Gorsuch, J., concurring).

The Tenth Circuit stands apart from every other Circuit Court of Appeals with regard to its interpretation and application of the physical restraint enhancement, a specific offense characteristic for armed robbery. § 2B3.1(a), (b)(4). Ignoring both the plain language used by the Sentencing Commission to define the phrase 'physically restrained,' and the illustrative examples that follow the definition, the Tenth Circuit has rewritten the Guidelines to affect a 20% increase in every Guideline range for armed robbery. In other words, defendants sentenced in every other circuit enjoy a base offense level that is 20% lower than their counterparts in the Tenth Circuit.

This case is emblematic. Petitioner David Vargas suffered the 20% increase to his base offense level calculation due to the district court's application of the physical restraint enhancement, despite the fact that Petitioner did not physically restrain anyone. His correct Guideline range should have been 151–188 months; instead, the Guideline error resulted in the range being 188–235 months. The Tenth Circuit refused to correct the mistake because, while acknowledging its disregard for both the Guidelines definition of 'physically restrained' and the instructive examples that immediately follow the definition, the law of the circuit holds that physical restraint occurs whenever victims are afraid and might not act due to their fear.

This Court should grant certiorari to resolve this conflict. The circuit split is clear and entrenched. Three circuits explicitly reject the use of how the victim feels as the basis for finding physical restraint. Four circuits explicitly reject the notion

that pointing a gun at someone and saying "don't move" constitutes physical restraint, while four more circuits hold the opposite. The issue is significant. And the Tenth Circuit's position is wrong. It contravenes the plain text of the Guidelines, which focus exclusively on the defendant's conduct. It also impermissibly rewrites the Guidelines so that every defendant in the Tenth Circuit has a 20% higher Guideline range than any defendant in any other circuit.

STATEMENT OF THE CASE

A. Factual Background

On November 14, 2022, Petitioner and two others robbed a Footlocker store and a DSW store, both in the Denver (Colorado) area. Vol. I, 9–16; S.V.II, 326.[1] Inside the Footlocker, Petitioner showed a firearm, and apologized for doing so. *Id*., 352. The store manager, Mr. Hurlbert, recalled hearing "a click." *Id*., 783. Per Mr. Hurlbert, Petitioner "made it known that he had a weapon" and "said, You're [sic] going to have to let us take everything." *Id*., 788.

After showing that he was armed, Petitioner then "kind of explained why he was doing it, and kind of that this was like, his first time and he doesn't normally do things like that." *Id*., 790. Mr. Hurlbert testified that he was "surprised and then nervous" when Petitioner displayed the gun and did not make any effort to stop the pair. *Id*., 790–93. He "backed up at first," hearing out Petitioner. *Id*., 796. When Petitioner displayed the gun, Petitioner held it in his left hand, pointing it "towards his hip or towards his crotch area." *Id*., 789 and 799. Petitioner did not point the

[1] "Vol." and "S.V." refers to the volume and supplemental volume of the record of appeal in the Tenth Circuit.

gun directly at anyone other than himself. *Id.* Mr. Hurlbert noted that the gun was pointed such that if it went off, "it would have shot [Petitioner's] foot or at the ground." *Id.*, 471. Petitioner didn't raise his voice, make threats, use force, nor did Petitioner touch anyone or physically remove property from anyone. *Id.*, 504–05. Petitioner did not make anyone get on the ground. *Id.*, 506.

Inside the DSW, two employees were present on the sales floor and keeping close tabs on Petitioner and his accomplice. *Id.*, 538, 544. The two robbers grabbed some shoes and "went to the checkout lane." *Id.*, 361. A cashier "started ringing the shoes up and taking the tags off." *Id.* Petitioner pulled out a debit card from his fanny pack, "pulled the gun out[,]" and "set it on the counter." *Id.*, 361–2, 400. At the time, the employee at the cashier position "was really worried" and "just scared." *Id.*, 585. She testified that she "was like there's no way I'm hearing this or seeing this right now." *Id.*, 578. The employee was trained that when "a gun [is] brandished," she was not "to do anything to try" to prevent the robbery. *Id.*, 585–86. She was "really pissed off" that Petitioner apologized while walking out of the store: she felt brandishing the gun "was just too much, you know, for five simple shoes." *Id.*, 580.

B. Procedural History

1. The government charged Petitioner with two counts of Hobbs Act robbery, violations of 18 U.S.C. § 1951(a), two counts of using a firearm during and in a relation to a crime of violence, violations of 18 U.S.C. § 924(c)(1)(A)(ii), one count of discharging a firearm in furtherance of a crime of violence, a violation of 18 U.S.C. §

924(c)(1)(A)(iii), and one count of being a prohibited person in possession of a firearm, a violation of 18 U.S.C. § 922(g)(1). Vol. I, 9–13. The jury returned a guilty verdict on five of the six counts, acquitting on the charge of discharging a firearm.[2] Vol. III, 6–9.

A presentence report (PSR) was prepared. Vol. II, 6–39. Relevant to this petition, Petitioner objected to paragraphs 27 and 33 of the PSR. Vol. I, 147–48. Paragraphs 27 and 33 both imposed two-level enhancements pursuant to U.S.S.G. § 2B3.1(b)(4)(B) for a victim being physically restrained in each robbery; Petitioner noted that he only brandished the weapon and the enhancement was inappropriate. *Id.*, 148.

At sentencing, Petitioner repeated his objections to both physical restraint enhancements. S.V.III, 22–24. The district court imposed both enhancements. *Id.*, 26-29. The court believed physical restraint occurred during the Footlocker robbery because that "[w]hile the gun was being brandished, the employees put their hands up" and "remained in that position until the defendant…left the store." *Id.*, 29. Implicitly recognizing the tenuous nature of this position, the district court then said "the DSW robbery makes it more clear." *Id.*

The court varied downward from the bottom of the advisory guideline range to 150 months for counts one and three, and imposed a 120-month sentence for count six to run concurrently with the 150-month sentence (for counts one and

[2] After the robberies, law enforcement engaged Petitioner and his accomplices in a prolonged car chase. S.V.II, 604–05, 615–46, 657–61, 663–64, 671–75. During the chase, one of the other robbers, not Petitioner, engaged in a gun fight with law enforcement. *Id.*, 380, 424, 675, 683, 687–89, 698, 702–04.

three). *Id.*, 59. The court then imposed the two, mandatory 84-month sentences for counts two and four, which by statute, have to run consecutively to any other sentence imposed. *Id*. The ultimate sentence imposed: 318 months' imprisonment and three years of supervised release. *Id.*, 59–60.

2. Petitioner appealed the sentence imposed. He renewed his argument that the two, two-level enhancements for physical restraint were inappropriate as he did not physically restrain anyone during the robberies.

The Tenth Circuit rejected this argument. The court reasoned that the physical restraint enhancement "must" apply whenever "the defendant's conduct…hold[s] the victim back from some action, procedure, or course, prevent the victim from doing something, or otherwise keep the victim within bounds or under control." Pet. App. 7a. Though noting that "mere brandishing…does not automatically create a situation where physical restraint of an individual occurs," the court held that someone not doing something because of the likelihood of "grave consequences" was physical restraint, *Id.*. "[K]eeping someone from doing something is inherent within the concept of restraint." *Id.*, 8a.

REASONS FOR GRANTING THE WRIT

A. There is an entrenched split on the question presented.

In the Tenth Circuit, a defendant who simply brandishes a gun during a robbery receives an enhanced sentence for physical restraint if a robbery victim feels a psychological restraint. The defendant need not target anyone with the gun,

nor must the defendant tell anyone to "not move" or "freeze." In the Tenth Circuit, the mere fact of the armed robbery justifies the physical restraint enhancement.

Even before the decision in the instant matter, the circuits "have split on the question whether the physical-restraint enhancement can be applied to situations in which an armed defendant simply orders his victims not to move and does not otherwise immobilize them through measures such as those outlined in the commentary to U.S.S.G. § 1B1.1." *United States v. Herman*, 930 F.3d 872, 874 (7th Cir. 2019).

1. Four circuits consider pointing a gun directly at a person and commanding them to not move[3] to be a physical restraint. *United States v. Dimache*, 665 F.3d 603, 606–07 (4th Cir. 2011); *United States v. Miera*, 539 F.3d 1232, 1234–36 (10th Cir. 2008); *United States v. Wallace*, 461 F.3d 15, 33–34 (1st Cir. 2006); and *United States v. Gonzalez*, 183 F.3d 1315, 1327 (11th Cir. 1999).

Only one of those circuits—the Tenth Circuit—said that a defendant *need not* even point a gun at a victim and tell them to freeze; instead, the Tenth Circuit has held that psychological coercion constitutes physical restraint. *Miera*, 539 F.3d at 1235–36; *Vargas*, 2024 WL 706842.

2. Four circuits say that pointing a gun at a person while commanding them to not move *does not* constitute physical restraint; more is needed. *United States v. Parker*, 241 F.3d 1114, 1118 (9th Cir. 2001); *United States v. Drew*, 200 F.3d 871,

[3] This combination of facts *did not* occur in this case. Petitioner did not target anyone with his gun. Petitioner did not command anyone to remain frozen or to not move. Petitioner brandished a gun and nothing more.

880 (D.C. Cir. 2000); *United States v. Anglin*, 169 F.3d 154, 163–64 (2d Cir. 1999); *United States v. Taylor*, 961 F.3d 68 (2d Cir. 2020); and *United States v. Garcia,* 857 F.3d 708, 713 (5th Cir. 2017).

In *Taylor*, the Second Circuit considered whether the physical restraint enhancement applied where a defendant committed multiple robberies by pretending to have a firearm, herding victims into closed spaces, and telling victims to, "not try anything stupid," and to, "get in the back; this is a robbery." 961 F.3d 68, 71–72. *Taylor* acknowledged the enhancement is "a provision drafted to deal with a special circumstance," and must be interpreted narrowly lest it instead "increase the Guidelines' base level, in what one would expect to be the considerable majority of robbery cases, from 20 to 22." *Id*., 77–78. The Second Circuit reasoned that a broad interpretation subjects "virtually every robbery … to the 2-level enhancement for physical restraint unless it took place in unoccupied premises or involved a 'quixotic' robber who explicitly instructed the victims that they should 'feel free to move about' or leave during the robbery's commission." *Id*., 78. Notable for purposes of this petition, *Taylor* explicitly held that "psychological coercion," without more, "is insufficient to trigger the physical restraint enhancement." *Id*.

The defendant (and two others) in *Garcia* robbed a gun store at gunpoint. 857 F.3d at 710. One defendant held a gun to a store employee's head and ordered the employee to the floor. Another defendant, armed as well, stood near the door, and the third defendant smashed a glass case holding guns. There was a brief shoot-out between store employees and defendants, with one employee suffering a gunshot

wound to his ankle. *Id*. The *Garcia* court reversed the district court's imposition of the physical restraint enhancement. Unequivocally rejecting the Tenth Circuit's "broader standard," the Fifth Circuit held that "standing near a door, holding a firearm, and instructing a victim to get on the ground—simply make explicit what is implicit in all armed robberies: that the victims should not leave the premises." *Id*., 713. While such conduct "caused the … [victims] to feel restraint, they were not subjected to physical restraint." *Id*. Because that *is* the conduct minimally necessary for an armed robbery, it cannot also serve as the conduct that "goes beyond what would normally occur during an armed robbery." *Id*., 712–13 and 714.

3. The three circuits that have yet to address this particular combination of facts consistently hold that "physical, not psychological, restraint is required" for imposition of the enhancement. *United States v. Bell*, 947 F.3d 49, 58 and n.5 (3d Cir. 2020); *United States v. Ziesel*, 38 F.4th 512, 517 (6th Cir. 2022) ("[R]obberies necessarily entail the creation of fear and apprehension that may lead victims to "restrain" their movements in some way. . . . Construing the physical-restraint enhancement in this way would allow it to be applied in nearly all robberies, rendering it meaningless."); *Herman*, 930 F.3d at 876 ("psychological coercion of gunpoint is not enough on its own") and 876–77 (a "terrified person will often yield to the threats [y]et that does not make the restraint a physical one.").

In *Herman*, the question was whether pointing a gun and then shooting the gun qualified as physical restraint. It was not a bank robbery; rather, after being shown someone else's gun, the defendant pulled out a revolver, told his victims,

"stay seated" and "I don't want to blow you guys back, but I will if I have to," gave chase, and then fired a shot that "flew past" the head of his pursuer. 930 F.3d at 873–74. In denying application of the physical restraint enhancement, the Seventh Circuit recognized the appropriate focus is "on the action of the defendant, not on the reaction of the victim." *Id.*, 876. Acknowledging that prior decisions "allowed the enhancement too liberally," *Herman* explicitly rejected the position that an order that permits no alternative to compliance qualifies for the physical restraint enhancement because it "could cover purely psychological coercion." *Id.*, 876-77. There must be more than "pointing a gun at someone and ordering that person not to move" for the physical restraint enhancement to apply. *Id.*, 877. "[C]oercion of being held at gun point" does not suffice. *Id.*

4. The seven circuits outright rejecting the notion that armed robbery in and of itself is a physical restraint have carefully considered the words used by the Sentencing Commission. Four have further refined the distinction between physical restraint and other forms of constraint, concluding that "[c]rucially, the victim's reaction does not determine whether there is or is not physical restraint." *Herman*, 930 F.3d at 876; *Bell*, 947 F.3d at 57; *Garcia*, 857 F.3d at 712–14; *Ziesel*, 38 F.4th at 517.

The position occupied by all seven circuits is reinforced by the fact that the Sentencing Commission specifically defined 'physically restrained' to mean "the forcible restraint of the victim such as by being tied, bound, or locked up." § 1B1.1 cmt. n.1(L). Both the plain language of the enhancement and the three

demonstrative examples leave no question that the Sentencing Commission intended only to enhance a defendant's Guideline range for what a defendant actually does *to* someone and not based on how a victim feels.

Indeed, to find otherwise would mean that "virtually every robbery would be subject to the 2-level enhancement for physical restraint unless it ... involved a 'quixotic' robber who explicitly instructed the victims that they should 'feel free to move about' or leave during the robbery's commission." *Anglin*, 169 F.3d at 165. Allowing victim psychology to enter the conversation removes the word 'physical' from the enhancement and rewrites the Guidelines so that a 2-point enhancement applies whenever a victim *feels* restrained. Such a broad construction of the physical restraint enhancement renders it meaningless; it effectively allows "the exception (the enhancement) to swallow the rule (the offense)." *Ziesel*, 38 F.4th at 517.

5. The split is entrenched. Inconsistent definitions and analytical approaches throughout the circuits illustrate the hopeless indeterminacy of the physical restraint enhancement. Most circuits at least honor the illustrative examples in the Guidelines as "types of conduct that fall within the meaning of" physical restraint. *Bell*, 947 F.3d at 55 (collecting cases from the circuits). Nevertheless, the Tenth Circuit continues to eschew the plain language of the Guidelines, the examples within the Guidelines, and the clear reasoning from seven sister circuits. The Tenth Circuit has also refused to reconsider its position en banc. Pet. App. 11a. There is no reason to believe that any circuit will reconsider its interpretation of the phrase

physical restraint. Only this Court can resolve the enduring uncertainty as to the definition and scope of the physical restraint enhancement.

B. There is a pressing need to resolve the uncertainty as to the limits of the phrase "physical restraint."

The Sentencing Guidelines play an outsized role in determining a defendant's sentence. The conflict here has implications in other contexts.

1. The "*Guidelines are in a real sense the basis for the sentence*." *Molina-Martinez v. United States*, 578 U.S. 189, 199 (2016) (quoting *Peugh v. United States*, 569 U.S. 530, 524 (2013) (emphasis in original)). The Guidelines were devised to achieve "*uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct, as well as *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." *Rita v. United States,* 551 U.S. 338, 349 (2007) (emphasis in original). Even when the Guidelines became advisory, this Court stated that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall,* 552 U.S. at 49 and 50 n.6 ("district courts must begin their analysis with the Guidelines"). A district court that "improperly calculates a defendant's Guidelines range … has committed a significant procedural error." *Molina-Martinez*, 578 U.S. at 199 (alterations adopted).

2. The government prosecutes thousands of robbery and extortion cases per year.[4] Application of the physical restraint enhancement increases the penalties across a wide range of Guidelines: § 2B3.1(b)(4)(B), § 2B3.2(b)(5)(B), and 2E2.1(b)(3)(B). This Court has made clear, specifically in the Guidelines context, that "any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles*, 585 U.S. at 139 (cleaned up).

The geographical location of Petitioner's offense alone increased his guideline range (and ultimately his sentence). The Guidelines set the base offense level for robbery at 20. § 2B3.1(a). The Tenth Circuit's automatic 2-level enhancement creates a new base offense level of 22. In practical terms, this means a 20% *increase* in a defendant's Guideline range.[5] Had Petitioner been convicted in *any other circuit*, his guideline range would be lower—indeed, it would be 20% lower. It's not just Petitioner, though. Any similarly-situated individual will categorically have a lower guideline range in any other circuit. Consider that this conflict exists between the neighboring border states of New Mexico (in the Tenth Circuit) and Arizona (in the Ninth Circuit).

[4] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table20.pdf

[5] Take a defendant in criminal history category VI who commits an armed robbery in the Seventh Circuit and the victims felt afraid. The two-point enhancement for physical restraint *would not* factor into the Guidelines calculation. The Guideline range for robbery for this individual is 70–87 months' imprisonment. But in the Tenth Circuit, the two-level enhancement for physical restraint *would* apply, and this same defendant's Guideline range is 84–105 months' imprisonment.

3. Resolution of this matter is necessary to ensure that the "cardinal principle" of textual interpretation "giv[ing] effect, if possible, to every clause and word," remains in full force. *Loughrin v. United States*, 573 U.S. 351, 358 (2014). An inevitable consequence of ignoring this 'cardinal principle' is that the Tenth Circuit's decision effectively rewrites the Guidelines so that the base offense levels for robbery and extortion are two points *higher* than set by the Sentencing Commission. This creates separation of powers issues. *Mistretta v. United States*, 488 U.S. 361, 393 (1989) (the Sentencing Commission's "powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis[,]" and it is "not a court, does not exercise judicial power," but instead is "fully accountable to Congress").

C. This case is an ideal vehicle to resolve the conflict.

This case presents a clean vehicle to resolve the question presented. Petitioner preserved the issue by challenging the application of the enhancement at the district court. Vol. I, 147–49. Petitioner renewed the argument on appeal and the Tenth Circuit Court of Appeals ruled on the issue. Pet. App. 2a-10a. There are no procedural obstacles to this Court's review.

This case also involves the least culpable conduct that has given rise to the circuit split. Petitioner brandished a gun during two robberies and nothing more. Petitioner did not tell store employees to not move. Petitioner did not target anyone with his gun. The conduct was "materially different from the Guidelines examples." *Anglin*, 169 F.3d at 164. Thus, this case affords the Court the opportunity to

consider the entire scope of the disagreement among the courts of appeals and to resolve it fully.

D. The Tenth Circuit's analysis is wrong.

The Tenth Circuit's analysis is wrong on three counts: it runs counter to the text of the Guidelines, lacks any discernable limits, and unilaterally increases the base offense level for robbery. The resulting decision cannot be squared with the purpose of the Guidelines and the longstanding requirement of uniformity in sentencing law. *Taylor v. United States*, 495 U.S. 575 (1990); 18 U.S.C. § 3553(a)(4), (6).

1. The panel's decision ignores the fundamental rule of interpretation that words must be given their ordinary meaning. Pet. App. 2a-10a. The panel held that the restraint is physical when a victim may suffer some psychological hesitation. *Id.* In so holding, the Tenth Circuit ignores the word 'physical' and so rejects the basic rule of interpretation that words must be given their ordinary meaning. *Niz-Chavez v. Garland*, 593 U.S. 155, 163 (2021) ("affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning.").

The word " 'physical' is an adjective which modifies (and hence limits) the noun 'restraint.' " *Taylor*, 961 F.3d at 78. In deciding how a statute defines an offense, the " 'verb test' certainly has value as an interpretive tool." *United States v. Rodriguez–Moreno,* 526 U.S. 275, 279–80 (1999). While restraint is a broad concept, the Commission's use of the word 'physical' signifies a precise construct that excludes psychological restraint. This prevents courts from getting mired in

"mental, moral, philosophical, even theological considerations" the victims may or may not experience. *Anglin*, 169 F.3d at 164. It ensures the focus of the court's inquiry is the defendant's conduct and nothing more.

The limited application of this enhancement is further bolstered considering the Commission provided a non-exhaustive list of (illustrative) examples of the types of conduct (by the defendant) that qualified as physical restraint. Per the Commission, a defendant physically restrains a victim when the victim is "tied, bound, or locked up." § 1B1.1 cmt. n.1(L). Most circuits understand that this is "not an exhaustive list, but rather only examples of the types of conduct that fall within the meaning of the term." *Bell*, 947 F.3d at 55 (collecting cases from other circuits). The examples reflect the ordinary meaning of the words used in the enhancement and "are intended as meaningful signposts on the way to understanding the Sentencing Commission's enhancement purpose." *Anglin*, 169 F.3d at 164.

The Tenth Circuit rejects this common-sense understanding of the physical restraint enhancement. Instead, the Tenth Circuit applies the enhancement without ascertainable limits, such that it includes a victim's emotional or psychological reactions. *United States v. Joe*, 696 F.3d 1066, 1071 (10th Cir. 2012). This gloss on the Guidelines violates the well-settled principle that courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997).

2. The Tenth Circuit's atextual approach permits courts, prosecutors, and probation officers to evade the limits of the physical restraint enhancement by

simply saying "the victim was too afraid to move." In reading the enhancement to apply to both physical restraint affected by the defendant and whatever psychological, philosophical, or moral restraint a victim feels, the enhancement applies now without qualification. This is wrong: the plain text and the examples in the Guidelines all focus on the defendant's conduct—the enhancement is designed to further punish defendants *based on their conduct*. The victim's feelings are irrelevant to this enhancement.

Yet, in the Tenth Circuit, every defendant who commits armed robbery is "subject to the 2-level enhancement for physical restraint[.]" *Ziesel*, 38 F.4th at 517. This is because in the face of an armed robbery, any victim will undoubtedly be restrained from doing something—by the mere fact of the robbery. Indeed, the only defendant who might avoid this enhancement is the "quixotic robber who explicitly instructed the victims that they should 'feel free to move about' or leave during the robbery's commission." *Taylor*, 961 F.3d at 78.

3. In direct contravention of this Court's precedent, the Tenth Circuit has effectively rewritten the Guidelines by erasing the word 'physical' and interpreting the word 'restraint' more broadly than the plain language of the Guidelines (and illustrative examples) allow. *Pavelic & LeFlore v. Marvel Entm't Grp.,* 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it."). *See also United States v. Fulford*, 662 F.3d 1174, 1178 (11th Cir. 2011) ("it is not our function to modify, amend, or improve statutes or guidelines"); *United States v. Parker*, 762 F.3d 801, 809–810 (8th Cir. 2014) ("As appellate judges, we must follow the law, not

make categorical sentencing policy decisions reserved for Congress and the Sentencing Commission.").

By reading out the word "physically" from the physical restraint enhancement, the Tenth Circuit rewrote "the Guidelines and bypass[ed] the framework created by the Commission." *United States v. Sandoval*, 152 F.3d 1190, 1193 (9th Cir. 1998). By its own admission, the Tenth Circuit has "taken a different approach" from other circuits. Instead of limiting application to "acts that are similar to the listed examples" in the Guidelines, the Tenth Circuit defines 'physical restraint' "very broadly indeed." *Joe*, 696 F.3d at 1072. The practical effect of the Tenth Circuit's revision is that the base offense level for all armed robbery is 22, not 20 as set by the Sentencing Commission.[6]

It is grossly unfair for the Tenth Circuit to rewrite the Guidelines in a way that unilaterally increases the base offense level for federal defendants in Utah, Colorado, Wyoming, Oklahoma, and New Mexico. Ignoring fundamental principles of statutory interpretation and ignoring elementary separation of powers principles cannot be tolerated. Especially when the result directly and adversely affects a person's liberty interests.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

[6] The Sentencing Commission recognizes that 20 is a "relatively high base offense level" and that "an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms." § 2B3.1, cmt. background.

Respectfully submitted,

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