No. 24-5433

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

REPLY BRIEF FOR PETITIONER

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Reply Brief For Petitioner

The Government defends the Tenth Circuit's judgment as if the facts were something different. Petitioner did not target anyone with his gun nor did Petitioner order anyone at gunpoint to not move. The petition challenges the lower court's central legal holding that the physical restraint enhancement includes psychological restraint. This theory eviscerates the core principle of statutory interpretation that the ordinary meaning of words controls, and permits courts to rewrite the Guidelines and impose lengthy sentences based on conduct that is neither physical nor restraining.

The Government's move is understandable. The expansive interpretation allows for courts to freely impose higher sentences under the guise of the sentence falling within the Guideline range. The Government barely defends this limitless interpretation. Its brief ignores the bulk of Petitioner's arguments, it recognizes the deeply entrenched circuit split, and its few responses conflict with the plain text of the Guidelines, this Court's precedent, and the explanatory comments provided by the Sentencing Commission. While this boundless interpretation of 'physical restraint' finds purchase in the Tenth Circuit (and the Eleventh, First and Fourth Circuits), it fails in seven other circuits. That disparity invites prosecutors and courts to seek exceptionally high sentences for the pedestrian armed robbery—the impact on liberty underscores why this conflict deserves review.

The Government cannot, and does not, contest that the circuits are deeply divided. But in this case, as in many previous cases, the Government attempts to

skirt the issue with the lower courts' wide-ranging interpretation and application of the physical restraint enhancement. Rather than address the simple question presented in this petition, the Government deflects, saying the matter is not for the Court, but rather the Sentencing Commission. That Congress delegated quasi–law making authority to the Sentencing Commission (or any other entity) has not, nor should it be, a valid reason to avoid resolving a deeply entrenched circuit split.

Nor can the Government dispute that the question presented is important. The Sentencing Guidelines are the lodestar for every federal sentence imposed. *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016). A within–Guideline sentence is presumed legitimate and defendants have virtually no recourse to challenge a term of imprisonment when the sentence falls within the correctly–calculated Guideline range. *Id.*, 199 ("the Guidelines are in a real sense the basis for the sentence") (internal quotation omitted). The Guideline provision at issue in this case—the physical restraint enhancement—effects a two-level increase to the base offense level for armed robbery; in real world terms, this change increases a defendant's presumptively–reasonable term of incarceration by, minimally, 20%. *Id.*, 199–200 (this Court observed that "there is considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges.") (internal quotation omitted). That is a hefty difference in terms of an individual's loss of liberty.

Yet the Government has successfully persuaded several circuits to adopt its boundless, atextual construction of the physical restraint guideline, and to impose

higher sentences based on conduct that did not physically restrain anyone. The Sentencing Guidelines should be uniformly applied across the country—not differently depending on whether a convicted robber happens to be in the Tenth, Second, or Seventh Circuit. The Tenth Circuit's and the Government's interpretation of the physical restraint enhancement, § 2B3.1(b)(4)(B), contravenes both the plain text of the enhancement and this Court's precedent regarding statutory interpretation.

While the Government makes half–hearted attempts to dispute the importance of the question presented, it fails to present a cogent argument against the significance of the matter. Its vehicle argument offers no substantive reason to leave this conflict unresolved. When the stakes are this high and the lower courts intractably divided, this Court should grant certiorari.

I. The Government's recommendation leaves the circuit split unresolved.

A. The Government admits the existence of the deep chasm separating the federal circuit courts of appeal, identifying both intra– and inter–circuit conflicts. BIO, 13–18. The Government recognizes that the Tenth Circuit treats the same conduct differently than the majority of other circuit courts of appeal. *Id*. Yet the Government's recommendation leaves the circuit split unresolved.

Both Petitioner and the Government recognize that the split is entrenched and leads to different outcomes in similar (or identical) cases. This fact alone—that the same conduct produces different Guideline ranges—is sufficient to warrant certiorari. This Court routinely grants certiorari to resolve splits of lesser severity.

See, e.g., Bittner v. United States, 143 S.Ct. 713 (2023) (No. 21-1195); *Babb v. Wilkie*, 140 S.Ct. 1168 (2020) (No. 18-882); *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S.Ct. 768 (2020) (No. 18-1116).

As Petitioner explained, and the United States agrees, sentencing courts applying the physical restraint enhancement have devised three different approaches to determining if physical restraint was used to facilitate an armed robbery:

> Approach 1: Determine if a victim felt restrained during the course of the robbery when a gun was brandished
>
> Approach 2: Determine if defendant pointed a gun at a victim and gave a command
>
> Approach 3: Determine if the defendant did something *more* than point a gun and give a command

The Tenth Circuit refuses to reconsider its limitless interpretation and application of the physical restraint enhancement that typifies Approach 1; the Tenth Circuit applies the physical restraint enhancement whenever a victim feels that s/he cannot do precisely as s/he pleases because of the fact of a robbery. Thus, Approach 1 includes psychological restraint in the definition of physical restraint. The Eleventh Circuit also employs an equally limitless approach, most recently affirmed in *United States v. Deleon*, 116 F.4th 1260 (11th Cir. 2024). However, *Deleon* calls for this Court (or the *en banc* Eleventh Circuit) to address this unbounded, atextual interpretation of the physical restraint enhancement. *Id.*, 1261. As of the filing of this Reply, the petition for rehearing *en banc* in *Deleon* remains pending—and should the Eleventh Circuit reconsider using the same

atexutal interpretation as the Tenth Circuit, the circuit split will remain unabated. There will still be three disparate approaches to this enhancement, meaning a defendant's sentence varies wildly depending upon where in the country s/he is sentenced.

The uncertainty makes all of the difference to Petitioner, despite an attempt by the Government to suggest otherwise. BIO, 8. The *only* way in which Petitioner's Guideline range includes the physical restraint enhancement is under Approach 1.

This approach—one that includes psychological restraint within the definition of physical restraint—is criticized by the circuits applying Approaches 2 and 3 and for good reason. First, it ignores the plain language of the Guideline. *See, e.g, United States v. Parker*, 241 F.3d 1114, 1118–19 (9th Cir. 2001) (refusing to apply physical restraint enhancement where robber pointed gun at victim and ordered her to get down because "Congress meant for something more than briefly pointing a gun at a victim and commanding her once to get down to constitute physical restraint, given that nearly all armed bank robberies will presumably involve such acts"); *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999) (this limitless interpretation ignores the "plain meaning of the words"); *United States v. Herman*, 930 F.3d 872, 876 (7th Cir. 2019) ("Words should mean something, and in this case, the fact that the Guidelines call for physical restraint tells us that not all restraints warrant the two-level enhancement."). Second, it rewrites the Guidelines so that every armed robbery includes the two–point base offense level enhancement for physical restraint. The practical effect is an increase to the base offense of at

least 20% for everyone convicted of armed robbery—"unless [the robbery] took place in unoccupied premises." *Anglin*, 169 F.3d at 165; *see also Herman*, 930 F.3d at 875–76 ("If the Guideline had been meant to apply to all restraints, it would have said so; instead, it specifies *physical* restraints. That limitation rules out psychological coercion, even though such coercion has the potential to cause someone to freeze in place.") (emphasis in original).

The difference between Approach 1 and Approaches 2 or 3 make all of the difference to Petitioner. For Petitioner, he would not suffer the increased base offense level under either Approaches 2 or 3. Under either Approach 2 or 3, his correctly–calculated Guideline range would be 151–188 months (not 188–235 months, as both the district court and Tenth Circuit found unobjectionable).

B. Trying to minimize the consequences of the circuit split, the Government suggests that Petitioner's interpretation of Tenth Circuit jurisprudence "lacks merit." BIO, 11. The Government tries to bolster the Tenth Circuit's flawed approach by (incorrectly) suggesting that psychological restraint is not considered by courts in the Tenth Circuit; the Government arrives at this mistaken conclusion because it omits a critical case, *United States v. Joe*, 696 F.3d 1066 (10th Cir. 2012), from its overview of Tenth Circuit physical restraint jurisprudence.

First the Government glosses over *United States v. Rucker*, 178 F.3d 1369 (10th Cir. 1999). In *Rucker*, the Tenth Circuit implicitly acknowledges the intended application of the physical restraint enhancement, but then signals its inclination towards a limitless interpretation by saying that, "since nearly every time one

points a gun at a victim during a robbery, the pointing of the gun physically restrains the victim in some way." 178 F.3d at 1373. Moreover, the Government conveniently omits the actual conduct at issue in *Rucker*: during a robbery, the defendant "ordered customers and clerks to the floor, pointing the gun at them." *Id.*, at 1370. Petitioner did not do any of that.

United States v. Miera follows *Rucker* without deviation; because a firearm was waved about, and because "individuals were commanded not to move," the physical restraint enhancement applied. 539 F.3d 1232, 1236 (10th Cir. 2008). Again, Petitioner did not do any of that. *Miera*, though, offers an explanation as to how ordering someone to not move was the equivalent of tying or locking someone up: "Keeping someone from doing something is inherent within the concept of restraint[.]" *Id.*, 1235–36.

Critically absent from the Government's discussion is *United States v. Joe*. *Joe* does several things that directly undercut the Government's position. First, *Joe* explicitly recognizes the circuit split—and that the Tenth Circuit flirts dangerously close to eliminating the word 'physical' from the Guideline. 696 F.3d at 1071–72. Second, *Joe* acknowledges that under the Tenth Circuit's atextual, boundless interpretation of physical restraint, "it is quite a challenge to conceive of a restraint that would not be deemed "physical" under this court's case law." *Id.*, 1072. Thus, despite the Government's attempts to make it otherwise, the Tenth Circuit imposes the physical restraint enhancement so long as a victim suffers some psychological

restraint, in other words, whenever a victim is unable to do whatever s/he wants during an armed robbery.

The Government's baseless efforts to curb the reach of the Tenth Circuit's physical restraint jurisprudence, where the judges have chosen not to, cannot diminish the importance of the question presented or the need for this Court's attention.

II. This case is the rare vehicle that will allow this Court to answer the narrow question presented and resolve the circuit split.

A. The Government does not contest that Petitioner preserved the objection to the Tenth Circuit's boundless application of the physical restraint enhancement. This case thus presents the rare opportunity to resolve the entrenched split on the physical restraint enhancement.

More critically, as the Guidelines drive every single federal sentence, this case presents the Court with the opportunity to resolve the entrenched split on all versions of physical restraint. Defendants in five circuits—First, Fourth, Sixth, Tenth, and Eleventh—will likely find futile any effort to preserving objections to the physical restraint enhancement given these circuit's long-standing rejection of 'physical' as a modifier of 'restraint.' *Joe*, 696 F.3d at 1072; *Deleon*, 116 F.4th at 1269 (Rosenbaum, J., concurring) (collecting cases). These circuits apply the physical restraint enhancement "in the absence of bodily contact, confinement, or other physical force." *Deleon*, 116 F.4th at 1269 (Rosenbaum, J. concurring). And of course, the mere threat that the Government will seek to use basically *any* conduct occurring during an armed robbery to enhance a defendant's Guideline range

undoubtedly pressures defendants in those jurisdictions to forgo trial, often times waiving their right to appeal as part of the "negotiated" plea bargain.

B. The Government's first and primary vehicle argument is that because "the U.S. Sentencing Commission can amend the Guidelines," BIO, 8–10, this Court should not address the entrenched circuit split. That an entity created by Congress *can* do something does not translate in present–day or even future action. The mere possibility that the Commission could, one day uncertain, address the physical restraint enhancement to fix this intractable circuit split, does not mitigate the present–day need to resolve the deep fractures separating the federal circuit courts of appeal on the issue of physical restraint.

That the Commission now has a quorum is irrelevant to the question presented. BIO 8–11. Petitioner detailed the deeply entrenched circuit split with which the Government agrees, and a quorum does nothing to address the sentencing disparity generated by wildly varying definitions of 'physical restraint.' Moreover, the Government implies that because the Commission previously identified this very issue as a priority, this Court need not address the matter. BIO, 9–11. However, the Government's brief relies on outdated materials from 2023. For the next amendment cycle, the Sentencing Commission's explicit goals are "[s]implifying the guidelines and clarifying their role in sentencing, included revising the "categorical approach" for purposes of the career offender guideline and possibly amending the *Guidelines Manual* to address the three-step process set forth in §1B1.1 (Application Instructions) and the use of departures and policy

statements relating to specific personal characteristics." https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20240808_fr_final-priorities.pdf (also found at Final Priorities for Amendment Cycle, 88 FR 66176-02 (August 14, 2024)). Notably missing from the Commission's stated priorities are either § 2B3.1(b)(4)(B) or the phrase 'physical restraint.'

The Sentencing Commission will likely not address the physical restraint enhancement in the next amendment cycle; it's simply not a stated priority. Courts of appeal are resistant to reviewing precedent. "[U]nless and until the Supreme Court...abrogates precedent," the lodestar Guideline range for armed robbery will vary by at least 20% depending on the circuit in which a defendant finds themselves. *Deleon*, 116 F.4th at 1261.

C. The Government's second vehicle argument is to point to several petitions for certiorari that were denied. BIO, 8. The Government's efforts are wasted. Notably, only one petition identified by the Government actually addressed the physical restraint enhancement, *Ware v. United States*, 144 S.Ct. 1395 (2024) (No. 23-5946). And *Ware* is inapposite: Ware (and his codefendant) forced victims to the ground at gunpoint and "literally restrained an employee by the neck." *United States v. Ware*, 69 F.4th 830, 855 (11th Cir. 2023). Arguably, that conduct alone takes *Ware* out of legitimate consideration as a good vehicle for this Court.

The Government then cites to petitions presenting fact–specific questions relating to the abduction enhancement, § 2B3.1(b)(4)(A). These other petitions for

certiorari address a wholly discrete enhancement, a four-point enhancement that applies if "any person was abducted to facilitate commission of the offense or to facilitate escape." § 2B3.1(b)(4)(A). *See* BIO, 8 (collecting denied petitions for certiorari raising a question about the *abduction* enhancement found in § 2B3.1(b)(4)(A)). Petitions presenting unrelated questions are rightfully ignored (especially since the Government never argues that "abduction" and "physical restraint" are synonymous). *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (when Congress uses words in one section but omits them in others, courts "refrain from concluding ... the differing language in the two subsections has the same meaning in each.").

D. The Government's third vehicle argument is plagued by the same logical fallacy that infects Tenth Circuit case law—both labor under blind acceptance of the theory that the physical restraint enhancement is open to an unbounded construction that "render[s] 'physically' a nullity." *Joe*, 696 F.3d at 1072. Both the Government and the Tenth Circuit advocate for a definition of physical restraint that includes psychological restraint. To that end, the Government suggests that there was no error below. BIO, 10–12.

Both the Government and the Tenth Circuit are wrong. There was error below and it was not harmless. Petitioner did not physically restrain anyone. Petitioner did nothing to similar to tying, binding, or locking up a person. To be certain, Petitioner brandished a gun in the course of two robberies—and he suffered the consequence of his decision to display all or part of the weapon, or to make the

weapon's presence "known to another person, in order to intimidate that person." § 1B1.1, cmt. 1(C). *See* Pet., 5–6. In at least seven other circuits, brandishing a weapon *would not* constitute physical restraint. In other words, in at least seven other circuits, Petitioner's Guideline range would be reduced by approximately 20–percent. *Contra Chatwin v. United States*, 326 U.S. 455, 464 (1946) ("Were we to sanction a careless concept of the crime of kidnaping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity.").

The Government argues in favor of the Tenth Circuit's limitless interpretation of 'physical restraint,' but continually fails to acknowledge that under this approach, "virtually every robbery would be subject to the 2–level enhancement for physical restraint unless it took place in unoccupied premises." *Anglin*, 169 F.3d at 165; *see also Deleon*, 116 F.4th at 1268 (Rosenbaum, J, concurring). *Cf. Chatwin*, 326 U.S. at 464–65 (loose construction of statutory language could lead to absurd results, "with its attendant likelihood of unfair punishment"). The Government has no response for the "problematic effect" of universally applying "a provision drafted to deal with a specific circumstance." *Anglin*, 169 F.3d at 165.

III. The Tenth Circuit's unbounded, atextual interpretation of 'physical restraint' is wrong.

A. As with a statute, the plain text of the Sentencing Guidelines is dispositive. Guidelines commentary are given controlling weight. *United States v. Checora*, 175 F.3d 782, 790 (10th Cir. 1999). And the Tenth Circuit's position cannot be squared with the plain language of § 2B3.1(b)(4)(B) or the unambiguous

commentary. *Id*., ("[i]f a word in the Sentencing Guidelines is not specifically defined and does not have an established common-law meaning, the word must be given its ordinary meaning."). The Guidelines allow for a two–level increase to a defendant's base offense level *only* when a defendant physically restrains a victim to facilitate an armed robbery. Per the Guidelines, this enhancement is intended to apply in unique circumstances, such as when a victim is "tied, bound, or locked up." § 2B3.1 cmt. background.

In ordinary usage, all definitions of 'restrain' "contemplate restriction, limitation, or confinement." *Deleon*, 116 F.4th at 1266 (Rosenbaum, J., concurring); *see also Checcora*, 175 F.3d at 791 (same). In ordinary usage, "physically would seem to be a modifier of restrained." *Joe*, 696 F.3d at 1072; *Deleon*, 116 F.4th at 1266 (physically qualifies the word restrained). Definitions of 'physically' center on the corporeal body and laws of physics. *Deleon*, 116 F.4th at 1166. As an adjective, 'physically' means "of or relating to natural phenomena perceived through the senses (as opposed to the mind); of or relating to matter or the material word; natural; tangible; concrete." *Id*. (internal quotation omitted).

The Government never accounts for "wrench[ing] 'physically' from its original place so that it now seems to describe the conduct or the inner thoughts of the *victim*." *Joe*, 696 F.3d at 1072 (emphasis in original). The Government repeats the same erroneous logic deployed by the Tenth Circuit, saying that the physical restraint enhancement applies because a victim was unable to move due to fear or the layout of her retail store. BIO, 10–11. But the physical restraint enhancement

does not contemplate psychological restraint (or physical barriers found within the location being robbed). It contemplates additional punishment *only* when the robber does something "with their firearms that goes beyond what would normally occur during an armed robbery," *United States v. Garcia*, 857 F.3d 708, 713 (5th Cir. 2017), like tying up or locking up a victim. *See also Anglin*, 169 F.3d at 164 ("the Sentencing Commission intended a more precise concept; if § 2B3.1(b)(4)(B) said only that the enhancement would apply "if any person was restrained," the courts would become involved in mental, moral, philosophical, even theological considerations, in addition to physical ones.").

The Government, like the Tenth Circuit, ignores the word 'physically' and rewrites the Guidelines so that psychological coercion is equivalent to being tied, bound, or locked up.[1] The Government insists that any armed robbery in which a victim cannot do precisely as s/he pleases (during that encounter)—which is all robberies unless the robberies "took place in unoccupied premises," *Anglin*, 169 F.3d at 165—the physical restraint enhancement applies. In other words, if the Government's and the Tenth Circuit's interpretation is correct, "virtually every robbery would be subject to the 2–level enhancement for physical restraint[.]"

[1] The Seventh Circuit recognizes that judges are "free to consider the psychological coercion under 18 U.S.C. § 3553(a)(1), as part of 'the nature and circumstances of the offense.' " *United States v. Herman*, 930 F.3d 872, 877 (7th Cir. 2019). If the defendant's conduct with the gun rises to a level beyond that of an ordinary robbery, *but does not physically restrain anyone*, prosecutors can seek a sentence that reflects the severity of the defendant's conduct. Asking for an increased sentence under § 3553(a)(1) "account[s] for the cases that lack a physical element—not a strained reading of the Guidelines." *Id.*

Anglin, 169 F.3d at 165. Instead of robbery having a base offense level of 20 as the Sentencing Commission deemed appropriate, the Government's and the Tenth Circuit's rewriting of the Guidelines sets the base offense level for robbery at 22. This effects a nearly 20% increase in sentence length.

B. The Government disputes that the Tenth Circuit's approach eliminates the word 'physically' as a modifier of 'restraint.' BIO, 11–12. Tenth Circuit case law directly contradicts the Government's position. *Joe*, 696 F.3d at 1072. A defendant who commits an armed robbery in the Tenth Circuit will be punished under § 2B3.1(b)(4)(B) as the Tenth Circuit interprets the physical restraint enhancement to include both physical and psychological restraint. In the Tenth Circuit and as advocated for by the Government, if a victim is prevented from even thinking about escape, the physical restraint enhancement applies.

Both the Government and the Tenth Circuit adopt an untenable position. The Guidelines already account for the intense nature of armed robbery; it's troubling that federal courts of appeal and the Government flout the Commission's expertise in setting the "relatively high base offense level for robbery" and instead use conduct that typifies most, if not all, robberies to "bring[s] about a considerable increase in sentence length[.]" § 2B3.1, cmt. background.

C. The Government's position is fundamentally in tension with two values driving sentencing. First, it ignores the plain language of the Guidelines. Resolution of this matter ensures "the cardinal principle of statutory construction is to save and not destroy." *United States v. Menasche*, 348 U.S. 528, 538 (1955). Courts are to

"give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section." *Id.*, 538–39. Second, the Government's position simply ignores the inevitable consequence of snubbing this 'cardinal principle,' which is that the Tenth Circuit's theory effectively rewrites the Guidelines so that the base offense level for robbery is two points *higher* than set by the Sentencing Commission. Neither courts nor prosecutors enjoy the privilege of creating and enacting legislation, nor can either reword a statute or the Guidelines. *Dodd v. United States*, 545 U.S. 353, 359 (2005) (courts are "not free to rewrite" statutes and when the law's "language is plain, the sole function of the courts...is to enforce it according to its terms.").

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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