No. ____

IN THE

Supreme Court of the United States

DEAN GROSS

Petitioner,

v.

UNITED STATES

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Violet N. D. Edelman
Buck Glanz
Assistant Federal Public Defenders
FEDERAL PUBLIC DEFENDER
111 Lomas Boulevard NW
Suite 501
Albuquerque, NM 87102

Jeffrey L. Fisher
Counsel of Record
Easha Anand
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

QUESTION PRESENTED

It is a federal crime, punishable by five years in prison, to "escape" from "any custody under or by virtue of any process issued under the laws of the United States by any court." 18 U.S.C. § 751(a).

The question presented is: Whether or under what circumstances a criminal defendant released to a halfway house is in "custody" and therefore can commit the crime of escape.

RELATED PROCEEDINGS

United States v. Gross, No. CR 21-0297 JB (D.N.M. May 23, 2022)

United States v. Gross, No. 22-2143 (10th Cir. Feb. 8, 2024)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a–7a) is unpublished but available at 2024 WL 488544. The relevant order and opinion of the district court (Pet. App. 8a–68a) is unpublished but available at 2022 WL 1651063.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2024. Pet. App. 1a. A timely petition for rehearing was denied on April 29, 2024. Pet. App. 69a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. § 751(a) provides: "Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title or imprisoned not more than five years, or both; or if the custody or confinement is for extradition, or for exclusion or expulsion proceedings under the immigration laws, or by virtue of an arrest

or charge of or for a misdemeanor, and prior to conviction, be fined under this title or imprisoned not more than one year, or both." 18 U.S.C. § 751(a).

INTRODUCTION

In recent decades, federal courts have increasingly relied on "halfway houses" to accommodate individuals who are released from detention pending trial or after serving sentences. Halfway houses typically provide a residence from which individuals who do not have safe or stable housing of their own can come and go to their jobs, medical appointments, and the like. Halfway houses have various rules, such as curfews, sobriety requirements, and the need to sign out or obtain permission before leaving. And all agree that breaking these rules can subject residents to sanctions, including having their release revoked and thus having to return to jail or prison.

But in the Tenth Circuit, an unauthorized absence after release to a halfway house *also* constitutes a freestanding federal crime, punishable by five years' imprisonment—namely, "escape" from "custody" under 18 U.S.C. § 751. According to the Tenth Circuit, the term "custody" in that statute means being subject to any legal "limit" on one's "freedom." *United States v. Foster*, 754 F.3d 1186, 1189 (10th Cir. 2014) (citation omitted); *see also United States v. Read*, 361 F.2d 830, 831 (10th Cir. 1966) ("custody" exists whenever "some restraint remains upon complete freedom"). Consequently, even though an individual who is released to a halfway house is no longer in detention, the Tenth Circuit holds that leaving a halfway house without permission (or failing to return on time) violates the federal escape statute. *United*

States v. Sack, 379 F.3d 1177, 1181 (10th Cir. 2004) (pretrial release); *Foster*, 754 F.3d at 1191 (post-imprisonment supervised release). Two other courts of appeals have followed the Tenth Circuit's lead, holding that an individual residing in a halfway house on supervised release is in "custody" for purposes of Section 751. *United States v. Edelman*, 726 F.3d 305, 309 (2d Cir. 2013); *United States v. Goad*, 788 F.3d 873, 876 (8th Cir. 2015). The Ninth Circuit expressly disagrees, holding that an individual released to a halfway house is not in "custody" under Section 751. *United States v. Baxley*, 982 F.2d 1265, 1270 (9th Cir. 1992) (pretrial release); *United States v. Burke*, 694 F.3d 1062, 1063 (9th Cir. 2012) (supervised release).

This Court should grant certiorari to resolve this circuit split and reign in the profligate use of the federal escape statute. The Tenth Circuit's expansive reading of Section 751 contravenes the ordinary legal meaning of the term "custody." It also stretches the crime of escape far beyond its common-law and traditional origins, which were limited to fleeing imprisonment or other physical detention, such as arrest. And the Tenth Circuit's conception of "custody" has sweeping implications. It dictates, for example, that people on pretrial release who exit the back door of a halfway house without permission to take a walk around the block—or who take a detour on the way home from work, stopping at their favorite restaurant—commit a federal felony under Section 751 and can be sentenced to five years in prison.

That makes no sense. The Government already has ample tools to enforce conditions of release to halfway houses. It needn't bring the heavy artillery of criminal prosecution into the mix.

STATEMENT OF THE CASE

A. Legal background

1. For centuries, the common law recognized a crime called escape. As historically understood, the crime punished those who escaped from "an actual arrest" or "imprisonment." 2 John Bishop, Criminal Law § 1093, at 812–13 (9th ed. 1923). The crime did not apply to individuals released from jail pending trial. *See* 1 William Burdick, The Law of Crime § 308, at 464 (1946). Nor is there any indication that the crime applied to people who had been released following the completion of prison sentences.

In 1930, observing that escapes from penal institutions "are often violent" and endanger "the lives of guards and custodians," Congress enacted the first federal escape statute. *United States v. Brown*, 333 U.S. 18, 21 n.5 (1948) (citation omitted). That statute is now codified at 18 U.S.C. § 751 under the title (itself enacted by Congress) "Prisoners in custody of an institution or officer." 18 U.S.C § 751.

In its current form, the federal escape statute reads in relevant part: "Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or from the custody of an officer or employee of the United States pursuant to lawful arrest," will be "imprisoned not more than five years." 18 U.S.C. § 751(a).

2. The question here is whether a released individual's unauthorized absence from a "halfway house" falls within this criminal prohibition. A halfway house—sometimes also called a residential reentry center or the like—is a community-based residential facility. Halfway houses first appeared in the United States in the 1840s. Gail Caputo, Intermediate Sanctions in Corrections 170 (2004). They were originally Quaker institutions designed to assist individuals released from prison with reentry into society. *Id.* They remained charitable institutions until the 1950s, when states and the federal government started using them as a tool for administering the criminal justice system. *Id.*

Today, halfway houses generally continue to be operated by private corporations or nonprofits. *See* Deloitte Consulting, U.S. Department of Justice: Bureau of Prisons Residential Reentry Centers Assessment, Recommendations Report 19 (2016).[1] At the same time, the federal courts use them at multiple stages of a criminal defendant's cycle in the system. As relevant here, when the Government charges someone with a crime, federal courts can order the individual "detained" or "released" pending trial. 18 U.S.C. § 3141. When releasing individuals, courts have long had authority to require them to post a bond to incentivize them to appear for future proceedings. *Id.* §§ 3142(a)(1), (b). Courts nowadays can also impose other "conditions" of release aimed at "assur[ing] the appearance of the person." *Id.* § 3142(c). One such condition is that the individual resides pending trial at a particular "place of abode," such as a halfway

[1] https://www.justice.gov/dag/page/file/914006/dl?inline.

house. *Id.* § 3142(c)(1)(B)(iv). In this scenario, halfway houses can "provide shelter and food for defendants who are homeless or have no stable community ties." Nat'l Inst. of Just., Pretrial Services Programs: Responsibilities and Potential 46 (2001). They can also serve other purposes, such as providing a structured environment for mandated drug treatment regimens. *See* 18 U.S.C. § 3142(c)(1)(B)(x). Individuals can also be assigned to halfway houses while on supervised release following completion of a term of imprisonment. *See id.* § 3583(d).

Unlike jails and prisons, halfway houses generally allow residents to come and go independently. Residents typically must advise the halfway house of those comings and goings. *See* Caputo, *supra*, at 181. They are also subject to various rules, which can include curfews, the need to obtain permission to leave for certain reasons, drug testing, and maintenance of employment. *Id.* But the basic goal of halfway houses remains to provide a way for individuals to live in their community in a stable manner.

Violations of halfway house rules subject residents to several consequences. These consequences can be as minor as a private reprimand or as serious as revocation of release, forcing the individual to return to jail or prison.

B. Factual and procedural background

1. In 2021, U.S. Marshals appeared at Petitioner Dean Gross's trailer home and questioned him about the whereabouts of his alleged cohabitant, Destiny Watkins. Pet. App. 9a–10a. Petitioner denied any association with Ms. Watkins and stated that nobody else was at the residence. *Id.* 10a. Upon further investigation, however, the marshals observed

another person in the trailer, whom they later identified as Ms. Watkins. *Id.*

Based on this encounter, the Government charged petitioner in the U.S. District Court for the District of New Mexico with making a false statement to a federal agent under 18 U.S.C. § 1001. Pet. App. 10a. Law enforcement officers arrested petitioner and placed him in jail pending his preliminary hearing. *Id.* 11a.

At that hearing, a magistrate judge declined "to keep [petitioner] in custody." Order Setting Conditions of Release 3, ECF No. 15 (hereinafter Release Order). Instead, the magistrate ordered petitioner "released" pending trial. *Id.*

The order establishing petitioner's "conditions of release" states that petitioner was "placed in the custody of" La Pasada Halfway House. Release Order at 2 (capitalization standardized). The release order also specified that petitioner could leave La Pasada for "employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; [and] court-ordered obligations." *Id.* With permission, petitioner could also leave for other reasons. *Id.*

Petitioner's release order warned him that violating his conditions of release could result in a "warrant for your arrest, a revocation of your release, an order of detention, a forfeiture of any bond, and a prosecution for contempt of court." Release Order at 3. The order said nothing about being charged with the crime of escape. Nor, at the preliminary hearing, did the magistrate judge signal that petitioner's assignment to the halfway house could subject him to Section 751's prohibition against escaping from "custody." Instead, the magistrate judge warned

petitioner that if he violated any of his release conditions, he would be "*back in custody* right away." Tr. of Prelim. Examination/Detention Hr'g 32, ECF No. 46 (hereinafter Prelim. Hr'g) (emphasis added).

Two months after his release from jail, petitioner left La Pasada and failed to return. Pet. App. 11a. On the day of his departure, La Pasada notified Pretrial Services of petitioner's unauthorized absence. *See id.* Law enforcement subsequently located petitioner and arrested him. *Id.*

2. Adding a second count to petitioner's still-pending indictment for making a false statement, the Government charged petitioner with "escaping from La Pasada" under Section 751. Pet. App. 11a–12a. Petitioner moved to dismiss the escape charge on the ground that a person released to a halfway house pending trial is not in "custody" for purposes of Section 751. *Id.* 13a–14a.

The district court denied that motion. Pet. App. 13a. The district court recognized that in the Ninth Circuit, "resid[ing] in a halfway house does not render [a defendant] in custody for § 751's purposes." *Id.* 43a (citing *United States v. Baxley*, 982 F.2d 1265, 1270 (9th Cir. 1992)). But explaining it was beholden to contrary "binding Tenth Circuit precedent," Pet. App. 37a, the district court ruled that petitioner "was in custody under § 751," *id.* 45a (quoting *United States v. Sack*, 379 F.3d 1177, 1179 (10th Cir. 2004)).

Faced with this ruling, petitioner entered into a plea agreement. He pleaded guilty to escape, while the Government dropped the false statement charge. Pet. App. 2a. In the plea agreement, petitioner expressly reserved the right to appeal his conviction on the ground that he was not in "custody" under Section 751

while residing on pretrial release at the halfway house. *Id.* 13a–14a.

The district court sentenced petitioner to 27 months in prison, to be followed by three years of supervised release. Pet App. 1a.

3. The Tenth Circuit affirmed. In a brief order, the panel reaffirmed that "an individual who resides at a halfway house pursuant to pretrial release is 'in custody' for purposes of 18 U.S.C. § 751." Pet. App. 7a (citing *Sack*, 379 F.3d 1177).

4. The Tenth Circuit then denied petitioner's motion for rehearing en banc. Pet. App. 69a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are openly and intractably divided over whether an individual released to a halfway house is in "custody" for purposes of the federal escape statute, 18 U.S.C. § 751. This issue is a recurring and important one, raising serious concerns of overcriminalization. And this case is an ideal vehicle for the Court to resolve the circuit split. Finally, the statute's text, structural considerations, history, tradition, and purpose all demonstrate that the decision below is wrong. Section 751 does not reach individuals released from detention to halfway houses.

I. The courts of appeals are divided over whether releasing someone to a halfway house places them in "custody" for purposes of the federal escape statute.

As numerous courts have recognized, the "circuits are divided" over whether "residence in a halfway house constitutes 'custody' under Section 751(a)." *United States v. Edelman*, 726 F.3d 305, 309 (2d Cir.

2013); *see also United States v. Burke*, 694 F.3d 1062, 1065 n.2 (9th Cir. 2012) (same); Pet. App. 42a (same). This disagreement exists both as to pretrial release and as to supervised release of individuals who have completed terms of imprisonment.

1. The Ninth Circuit was the first court of appeals to consider this question. In *United States v. Baxley*, 982 F.2d 1265, 1270 (9th Cir. 1992), the Ninth Circuit held that pretrial residence at a halfway house was not "custody" for purposes of the federal escape statute. Consequently, the Ninth Circuit reversed the defendant's escape conviction, explaining that "although Baxley risked revocation of his personal recognizance bond when he violated a condition of his release by his failure to return to the [halfway house], he did not escape from 'custody' as that term is defined in 18 U.S.C. § 751(a)." *Id.* The Ninth Circuit has since reaffirmed that an individual "ordered by a court to reside at a halfway house pending trial is not in 'custody' for purposes of" Section 751. *Burke*, 694 F.3d at 1064 (citing *Baxley*, 982 F.2d 1265).

Before and after the Ninth Circuit's decision in *Baxley*, district courts within the Tenth Circuit likewise held that release to a halfway house "is not a form of custody within the meaning of § 751(a)." *United States v. Evans*, 886 F. Supp. 800, 803 (D. Kan. 1995) (pretrial release); *see also United States v. Miranda*, 749 F. Supp. 1062, 1064 (D. Colo. 1990) (supervised release).

But in *United States v. Sack*, 379 F.3d 1177 (10th Cir. 2004), *cert. denied*, 544 U.S. 963 (2005), the Tenth Circuit reached the opposite conclusion. The Tenth Circuit recognized that the Ninth Circuit had held that pretrial release to a halfway house was not

"sufficiently restrictive to constitute custody." *Id.* at 1180–81. But the Tenth Circuit declared that it was "not persuaded" by the Ninth Circuit's reasoning on the issue. *Id.* at 1181 (citing *United States v. Depew*, 977 F.2d 1412, 1414 (10th Cir. 1992)). It held instead that an individual released to a halfway house pending trial is in "custody" under Section 751, reasoning that "custody" may involve "minimal" restrictions on freedom. *Sack*, 379 F.3d at 1178–81.

The Ninth Circuit subsequently recognized the conflict as well. It acknowledged that the Tenth Circuit "expressly rejected *Baxley* and adopted a definition of 'custody' far broader than the one" the Ninth Circuit had previously adopted. *Burke*, 694 F.3d at 1065. But the Ninth Circuit declined to abandon its precedent in favor of the Tenth Circuit's "expansive" construction of Section 751. *Id.*; *see also id.* at 1065 n.2 (recognizing that the Ninth and Tenth Circuit positions on this issue are irreconcilable).

2. The split over whether Section 751 applies to pretrial release to halfway houses is part of a broader disagreement among the federal courts of appeals over whether release to a halfway house constitutes "custody" for purposes of the federal escape statute.

The Ninth and Tenth Circuits have extended their opposing interpretations of Section 751 in the pretrial release setting to the supervised release setting, which follows the completion of a term of imprisonment. That is, both courts of appeals have carried their positions regarding pretrial release over to whether defendants on supervised release are in "custody" for purposes of the statute. *Compare Burke*, 694 F.3d at 1064 (9th Cir. 2012) (not in custody), *with United States v. Foster*, 754 F.3d 1186, 1194 (10th Cir. 2014) (in custody).

The Second and Eighth Circuits also hold, in line with the Tenth Circuit, that an individual on supervised release at a halfway house is in "custody" under Section 751. *See United States v. Edelman*, 726 F.3d 305, 309 (2d Cir. 2013), *cert. denied*, 571 U.S. 1175 (2014); *United States v. Goad*, 788 F.3d 873, 876 (8th Cir. 2015), *cert. denied*, 577 U.S. 1145 (2016).

The Second Circuit recognized that courts had "reached opposite conclusions" over the issue, with the Ninth Circuit and a district court in New York having held that "placement in a halfway house due to the violation of the terms of post-incarceration supervised release does not constitute custody." *Edelman*, 726 F.3d at 309; *see also United States v. Fico,* 16 F. Supp. 2d 252 (W.D.N.Y. 1998). But the Second Circuit found the Tenth Circuit's "broad interpretation" of Section 751 more "persuasive." *Edelman*, 726 F.3d at 309. The Second Circuit thus deemed it sufficient for the statute's "custody" element that supervised release in a halfway house subjects the defendant "to a restraint on his activities and limit[s] the amount of time he [can] spend out of the facility." *Id.*[2]

For its part, the Eighth Circuit held that a defendant escaped from "custody" under Section 751 when he left from a halfway house "in violation of the rules of both the facility and the terms of his supervised release." *Goad*, 788 F.3d at 876. In so ruling, the Eighth Circuit expressly "join[ed] the

---

[2] The Second Circuit also purported to follow the Sixth Circuit's holding in *United States v. Rudinsky*, 439 F.2d 1074 (6th Cir. 1971). *See Edelman,* 726 F.3d at 309. But the defendant in *Rudinsky* had not been *released* to a halfway house. Rather, he was serving a term of imprisonment there. *See Rudinsky*, 439 F.2d at 1075.

Second and Tenth Circuits in rejecting" the Ninth Circuit's interpretation of Section 751's "custody" element. *Id.*

II. The question how far the federal escape statute reaches is a recurring one of national importance.

This Court has previously decided two cases involving the federal escape statute. In *United States v. Brown*, 333 U.S. 18 (1948), the Court determined that sentences for Section 751 convictions must run consecutively to sentences for other offenses. And in *United States v. Bailey*, 444 U.S. 394 (1980), the Court construed the mens rea element of the statute. But this Court has never addressed the actus reus of Section 751. The Court should do so now.

1. The question presented implicates the conduct of a broad swath of individuals. According to the most recent available data, some 33,000 individuals per year spend time in one of the roughly 250 halfway houses that have contracts with the federal government. Deloitte Consulting, U.S. Department of Justice: Bureau of Prisons Residential Reentry Centers Assessment, Recommendations Report 9–10, 19 (2016). Many of these individuals incur unauthorized absences from those residences.[3]

---

[3] For example, a recent study in Colorado reported that 27% of criminal defendants assigned by state courts to halfway houses left at some point without permission. *Termination Reasons (Outcome), Community Corrections Residential Programs*, Colorado Community Corrections Information Billing System (2023), https://tableau.state.co.us/t/CDPS_Ext/views/Comcor-Residential-D8/ProgramTerminations.

Moreover, unauthorized absences from halfway houses account for nearly all Section 751 prosecutions. Federal prosecutors secure about 300 convictions for escape each year, and 89% of those convictions are for unauthorized absences from halfway houses. U.S. Sent'g Comm., *Federal Escape Offenses* 2 (Sept. 2023).[4]

Of course, these statistics suggest that thousands of individuals each year who are released to halfway houses and who absent themselves without permission are *not* charged with escape. But that only creates more cause for concern. Individuals in at least the Second, Eighth, and Tenth Circuits can be convicted and imprisoned for commonplace conduct that in the Ninth Circuit is not a crime; all that protects them—and individuals in other circuits without clear precedent on the issue—is prosecutorial discretion.

Finally, the impact of prosecutions for "escaping" from halfway houses falls disproportionately on people who are socioeconomically disadvantaged. Defendants who have secure home environments tend to be released on their own recognizance pending trial. The same is true of defendants with secure home environments who are released from prison. By contrast, defendants charged with low-level crimes "who are homeless or have no stable community ties" are often released to halfway houses. Nat'l Inst. of Just., *supra*, at 46. In short, defendants are often assigned to halfway houses as a "stop-gap measure" to "prevent homelessness." *Foster*, 754 F.3d at 1188

---

[4] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/202309_Escape.pdf.

(citation omitted). Courts should not lightly assume that Congress intended such conditions of release to subject people to the risk of additional criminal charges.

2. The Tenth Circuit's expansive construction of Section 751 also gives rise to serious overcriminalization concerns.

Halfway houses are often owned and operated by private companies with broad leeway, just like any other landlord, to set rules for those who live there. Violations of most of these rules are treated like violating any other release condition, which is to say defendants can have their release revoked and be forced to return to jail or prison. 18 U.S.C. § 3148(a). But the Tenth Circuit's rule transforms violations of one subset of these private rules—those about coming and going—into a federal felony. *See Sack*, 379 F.3d at 1181.

In fact, if the Tenth Circuit's conception of Section 751's "custody" element is right, individuals who commit even extremely minor violations of halfway house rules are subject to prosecutions under the statute. As this Court has observed, the "escape" element of Section 751 means "absenting oneself from custody without permission." *Bailey*, 444 U.S. at 407 (collecting cases and treatises). And there is no temporal period too small to satisfy this element. Fleeing prison or an arrest for even a few moments constitutes an "escape."

Combining the Tenth Circuit's capacious view of "custody" with Section 751's broad "escape" element makes even the most trivial absences from halfway houses federal criminal offenses. Consider, for example, one halfway house resident who traveled

several hours to visit his family for the weekend, as he was allowed to do, but could not get a ride back to the halfway house on Sunday. On Monday morning, he was put on "escape" status, and the Government eventually convicted him of violating Section 751. *See* Sen'g Hr'g Tr. 14–15, *United States v. Scarborough*, No. 5:19-cr-00070, ECF No. 38 (M.D. Ga. May 12, 2020). Indeed, under the Tenth's Circuit's conception of Section 751, a fifteen-minute unapproved absence from a halfway house—say, an unauthorized walk around the block—subjects a resident to a prosecution threatening five years in prison. So does returning fifteen minutes late from an *approved* absence.

The Tenth Circuit's conception of Section 751 would also seem to reach beyond halfway houses to criminalize violations of other minor pretrial and supervised release restrictions on movement. For one thing, the type of defendant who might otherwise be released to a halfway house is often instead ordered "to reside at the home of his mother or another relative" as a condition of release. *United States v. Fico*, 16 F. Supp. 2d 252, 255 (W.D.N.Y. 1998); *see also United States v. Miranda*, 749 F. Supp. 1062, 1064 (D. Colo. 1990). The Tenth Circuit has offered no reason why, in that situation, leaving a parent's residence without permission would not violate Section 751.

More generally, the Tenth Circuit holds that "a person is in custody under the escape statute if another person has the legal right to control his actions or limit his freedom." *Foster*, 754 F.3d at 1189 (citation omitted). Under this definition, custody "may be minimal, and indeed may be constructive." *United States v. Depew*, 977 F.2d 1412, 1414 (10th Cir. 1992). Indeed, a person is in "custody" in the Tenth Circuit

"so long as some restraint remains upon complete freedom." *Read v. United States*, 361 F.2d 830, 831 (10th Cir. 1966).

Virtually every individual released pending trial has *some* limitations on their freedom of movement. For example, defendants released on their own recognizance may be required to observe curfews, attend classes or treatment, check in periodically with government administrators, or refrain from leaving the county or state without permission. *See* 18 U.S.C. § 3142(c)(1)(B) (listing types of conditions that may be imposed). If violating any restriction on freedom—however slight—violates the federal escape statute, then violating any of these conditions is a federal crime.

III. This case is the right vehicle for resolving the question presented.

This petition presents an excellent vehicle for resolving whether Section 751 applies to individuals who are released to halfway houses.

1. The procedural posture of this case is ideal. The question presented was expressly preserved and passed upon below. Pet. App. 1a–2a, 7a. And the Tenth Circuit affirmed petitioner's conviction on the ground that "an individual who resides at a halfway house pursuant to pretrial release conditions is 'in custody' for purposes of" Section 751. *Id.* 7a (citing *Sack*, 379 F.3d at 1177). If that categorical interpretation of Section 751's "custody" element is wrong, petitioner's conviction cannot stand.

What is more, the facts of this case align with those in which the Ninth Circuit has held individuals released to halfway houses were not in custody. Just

like the defendant in *Baxley*, petitioner was permitted to leave the halfway house for employment and other approved activities. Release Order at 2; *Baxley*, 982 F.2d at 1269. And just like the defendant in *Burke*, petitioner here needed permission to come and go from the halfway house for certain other activities. Release Order at 2; *Burke*, 694 F.3d at 1064; *see also id.* at 1067–68 (Callahan, J., dissenting) (Burke "could not come and go from the facility as he pleased"). Yet the Ninth Circuit held that neither Baxley nor Burke was in "custody" under Section 751. *Baxley*, 982 F.2d at 1270; *Burke*, 694 F.3d at 1064.

The district court here observed that the judge in *Baxley* did not "check the box" denoting "custody" on the order setting Baxley's conditions of release, whereas the magistrate here checked such a box when releasing petitioner. Pet. App. 43a; *see also id.* 11a. But this distinction is irrelevant. Reaffirming *Baxley* in *Burke*, the Ninth Circuit did not pause to consider whether the district court had labeled the defendant's release a form of "custody." *Burke*, 694 F.3d 1062. Indeed, the Tenth Circuit itself has recognized that "[i]n *Burke*, the Ninth Circuit focused *only* on whether Burke's freedom was sufficiently restricted to constitute custody." *Foster*, 754 F.3d at 1191 (emphasis added); *see also Sack*, 379 F.3d at 1181 ("*Baxley* focused on whether the specific conditions of residence at a halfway house were sufficiently restrictive to constitute custody"). And as just explained, petitioner was not restricted at his halfway house any more than the defendant in *Burke* was.

But even if the way the magistrate judge characterized petitioner's release from detention mattered, the overall record here still does not indicate

petitioner was in "custody" for purposes of Section 751. On the order setting conditions of release, the magistrate judge checked the box ordering the U.S. Marshal to "release[]" petitioner, instead of the box to "keep the defendant in custody." Release Order at 3. And the magistrate judge left blank Box 7(i), which requires an individual to "return to custody" after his employment, schooling, and other activities. *Id.* at 2. Finally, when warning petitioner of possible consequences for violating his release conditions, the magistrate judge said: "[I]f there's any violation of these conditions, I would imagine you're going to be *back in custody* right away." Prelim. Hr'g at 32. All these actions indicate that petitioner was no longer in "custody" under Section 751 once released to the halfway house.

2. Now is the right time for the Court to answer the question presented. In years past, the Court denied certiorari in four cases involving whether Section 751 covers unauthorized absences from halfway houses. *See Edelman*, 571 U.S. 1175 (2014) (No. 13-569); *Goad*, 577 U.S. 1145 (2016) (No. 15-6450); *United States v. Mike*, 576 U.S. 1058 (2015) (No. 14-9016); *Sack*, 544 U.S. 963 (2005) (No. 04-7286). But the factual setting of this case is better than the settings in *Edelman*, *Goad*, or *Mike*. Each of those cases involved postconviction supervised release.

This case, by contrast, involves pretrial release, which best exemplifies how the Tenth Circuit's sweeping interpretation of Section 751's "custody" element departs from history and tradition (discussed *infra* at 29–30) and can lead to prosecutorial overreach. In many modern cases, individuals are released pending trial to halfway houses, only to have

their underlying charges fizzle into nothing. *See, e.g.*, *Sack*, 379 F.3d at 1178; Pet. App. 2a. The result is that many are prosecuted for "escaping" the halfway house to which they were released pending further proceedings, for charges the Government ultimately saw as unworthy of prosecution. Indeed, petitioner's initial charge here was for making a false statement under 18 U.S.C. § 1001 about the whereabouts of his alleged cohabitant. And the Government ultimately dropped the charge.

Sack is the one previous case in which this Court was asked to address the reach of Section 751 in the pretrial release setting. But opposing certiorari in *Sack* nearly twenty years ago, the Government suggested the Ninth Circuit's holding in *Baxley* that pretrial release at a halfway house did not constitute "custody" might be fact-dependent. U.S. Br. at 10–11, *Sack v. United States*, 544 U.S. 963 (2005) (No. 04-7286). The Government thus intimated that the Ninth Circuit might hold in a future case that pretrial release to a halfway house constituted "custody" for purposes of Section 751. *Id.*

The ensuing two decades since *Sack* have dispelled any uncertainty over whether the split between the Ninth and Tenth Circuits is genuine and significant. In *Burke*, the Ninth Circuit described its holding in *Baxley* as a blanket rule, explaining that a defendant "ordered by a court to reside at a halfway house pending trial is not in 'custody' for purposes of" Section 751. 694 F.3d at 1064. And in the three decades since *Baxley*, we are not aware of a *single* Section 751 prosecution within the Ninth Circuit for absconding from a halfway house in the pretrial release setting. (Nor are we aware, in the decade-plus

since *Burke*, of any similar Ninth Circuit prosecution in the supervised release setting.) There can no longer be doubt, therefore, that the law on the ground in the Ninth Circuit is different from in the Tenth—and that the Government itself understands that to be so.

In short, conduct that is innocent in California and Arizona is a crime punishable by five years in prison in Colorado and New Mexico. Only this Court's intervention can supply a uniform meaning to the federal escape statute.

IV. The Tenth Circuit's sweeping interpretation of the federal escape statute is incorrect.

The text, structure, statutory context, and purpose of Section 751 each demonstrate that release to a halfway house does not constitute "custody" for purposes of the federal escape statute.

1. We begin with the text. Legal dictionaries, the title of Section 751, and the use of the word "custody" in comparable statutes all demonstrate that the term is limited to physical detention or serving a sentence of imprisonment.

a. *Ordinary meaning of "custody."* Section 751 does not define the term "custody," so the "ordinary legal meaning" at the time Congress enacted the statute controls. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 73 (2012); *Hamilton v. Lanning*, 560 U.S. 505, 513 (2010); *see also Wisc. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018). When the federal escape statute was enacted, Black's Law Dictionary defined "custody" as "the detainer of a man's person by virtue of lawful process or authority; actual imprisonment." *Custody, Black's Law Dictionary* (2d ed. 1910). The next edition

of Black's Law Dictionary—published shortly after the statute's enactment—likewise defined "custody" to require "actual imprisonment," "physical detention," or the "power, legal or physical, of imprisoning or of taking manual possession." *Custody, Black's Law Dictionary* (3d ed. 1933). And the leading legal encyclopedia around the time of Section 751's enactment observed, in the very context of the crime of escape, that "[c]ustody consists in keeping the prisoner either in actual confinement or surrounded by physical force sufficient to restrain him from going at large or obtaining more liberty than the law allows." 30 Corpus Juris Secundum, Escape § 5 (1936).

The requirement of actual imprisonment, or other physical detention of a man's person against his will, excludes release to a halfway house. People released to halfway houses are not imprisoned. Nor are they otherwise physically detained—that is, their bodies are not subject to physical restraint. *See Detention*, *Black's Law Dictionary* (2d ed. 1910); *Physical*, *Black's Law Dictionary* (2d ed. 1910). Instead, individuals released to halfway houses can come and go from the residences, as they go about their lives in their communities, without being subject to bodily restraint.

Other legal dictionaries of the time reinforce this analysis, defining "custody" in terms that, if anything, even more obviously exclude release to a halfway house. One dictionary explained that "custody" is "detainer of a person by virtue of a lawful authority," such that "nothing less than actual imprisonment" suffices. John Bouvier, Bouvier's Law Dictionary and Concise Encyclopedia 261 (Century ed. 1934); *accord* Benjamin V. Abbott, Dictionary of Terms and Phrases

Used in American or English Jurisprudence 333 (1879) (defining "custody" as "actual imprisonment"). Another described "custody" as "[d]etention by lawful authority" or "actual imprisonment." William C. Anderson, A Dictionary of Law 302 (1913). And a later dictionary made clear that "[t]here is no such thing as custody of a person physically at large." Ballentine's Law Dictionary 300 (3d ed. 1969).

This Court itself has referenced Section 751's "custody" element in exactly these limited terms. In *Bailey*, this Court explained that "the prosecution fulfills its burden under § 751(a) if it demonstrates that an escapee knew his actions would result in his leaving *physical confinement* without permission." *United States v. Bailey*, 444 U.S. 394, 408 (1980) (emphasis added). In two other passages, the Court described persons covered by the statute as "escaped *prisoner[s].*" *Id.* at 413 (emphasis added); *id.* at 414 n.10. No one would call someone released to a halfway house a "prisoner."

b. *Other language in Section 751.* The title of Section 751—enacted by Congress itself—underscores that the word "custody" in the federal escape statute embodies its ordinary legal meaning. Congress's choice of language in a title is "especially valuable" where the court is interpreting "a focused, standalone provision." *Dubin v. United States*, 599 U.S. 110, 121 (2023). Even more so where the title "reinforces what the text's nouns and verbs independently suggest." *Id.* (quoting *Yates v. United States*, 574 U.S. 528, 552 (2015) (Alito, J., concurring in judgment)). Such is the case here. Section 751 is a standalone provision entitled "*Prisoners* in custody of institution or officer."

18 U.S.C.§ 751 (emphasis added). The word "prisoner" indicates that the statute is aimed at people who are incarcerated or otherwise subject to physical detention—a class that does not cover individuals released to halfway houses.

Focusing on a different textual aspect of Section 751, the Tenth Circuit has suggested that the word "any" before the term "custody" indicates that the word "custody" can be stretched to cover release to halfway houses. *See United States v. Foster*, 754 F.3d 1186, 1191 n.3 (10th Cir. 2014). The word "any," however, can "never change in the least, the clear meaning of the phrase" or word it modifies. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). If, for instance, someone requests "any" kind of apple, they would not be pleased to receive an orange. Therefore, the term "any" in Section 751 cannot broaden the concept of "custody" beyond what that word itself denotes. The phrase "any custody" ensures the statute covers various kinds of custody (whether it be arrest by a police officer, incarceration under the Bureau of Prisons, etc.), but the word "any" does not alter the requirement that the individual be in physical detention or serving a term of imprisonment.

c. *Comparable statutes.* Other statutory uses of "custody" in Title 18 of the U.S. Code underscore that "custody" excludes pretrial release to a halfway house.

Consider 18 U.S.C. § 3164, which distinguishes between "a detained person" awaiting trial and "a released person" awaiting trial. 18 U.S.C. § 3164(a). Section 3164 says that a detained person is "held *in custody*." *Id.* § 3164(c) (emphasis added). Meanwhile, the statute treats a "released" person as having a different status, even if (as in the case of release to a

halfway house) they have been released with "conditions." *Id.*; *see also id.* § 3142(c)(1)(B). Several other provisions in Title 18 also use the term "custody" to describe the status of individuals who are physically detained while serving terms of imprisonment. *See* 18 U.S.C. §§ 3050, 3161, 3563, 5003.

This Court itself has also determined that time living at a halfway house before trial is not custody for purposes of 18 U.S.C § 3585, which allows individuals to receive credit toward their prison sentences for time spent in "[p]rior [c]ustody." *Reno v. Koray*, 515 U.S. 50, 55 (1995) (quoting title of Section 3585(b)).[5] In support of its holding, the Court stressed that the federal courts of appeals had uniformly held that the phrase "in custody" did not include "restrictions placed on a defendant's liberty as a condition of release on bail." *Id.* at 59.

The Tenth Circuit has tried to distinguish *Koray*, asserting that "custody" under Section 3585 means something different from the word as used in Section 751. *Sack*, 379 F.3d at 1180. Yet the Court in *Koray* never suggested that Section 3585 uses the word "custody" in a specialized way, or differently from how the word is used in the federal escape statute. To the contrary, the Court suggested that word means the same thing in both statutes, expressly referencing

---

[5] Before the Court decided *Koray*, Congress amended Section 3585(b) to replace the term "custody" in the body of the provision (though not its title) with "official detention." But the Court explained that this change to conform the statute's "nomenclature" to related provisions did not change its meaning. *Koray*, 515 U.S. at 59–60. Accordingly, the Court based its holding as much or more on the meaning of the phrase "in custody" than the term "official detention." *Id.*

Bureau of Prisons guidelines which provided at the time that "the government may not prosecute for escape" an "unauthorized absence" from a halfway house. *Koray*, 515 U.S. at 60 n.4 (quoting U.S. Dep't of Just., Bureau of Prisons Program Statement No. 5880.28(c) (July 29, 1994)).

The district court here did not look to any of the foregoing statutes. Instead, it noted that the Bail Reform Act allows a district court to order a defendant who it releases from pretrial custody to "remain in the *custody* of a designated person"—perhaps believing this provision encompasses releasing a defendant to a halfway house. Pet. App. 56a–57a (quoting 18 U.S.C. § 3142(c)(1)(B)(i) (emphasis added)). But this provision does *not* concern halfway houses. Instead, it contemplates releasing a defendant to the supervision and care of a particular human being, such as the defendant's family member. *See, e.g.*, *United States v. Sanders*, 466 F. Supp. 3d 779, 782 (E.D. Mich. 2020) (fiancée as custodian); *United States v. Cross*, 389 F. Supp. 3d 140, 142 (D. Mass. 2019) (father); *United States v. Cortez*, 298 F. Supp. 3d 30, 30 (D.D.C. 2018) (mother).

Release to a halfway house falls under different subsections of this statute. For example, one subsection allows the court to place "restrictions" on the defendant's "place of abode." 18 U.S.C. § 3142(c)(1)(B)(iv). Another subsection allows release to a "specified institution" for "medical, psychological, or psychiatric treatment." *Id.* § 3142(c)(1)(B)(x). Still another subsection permits any other condition "reasonably necessary to assure" required court appearances and community safety. *Id.* § 3142(c)(1)(B)(xiv). Accordingly, as one district judge

has put it, a defendant released to the very halfway house at issue here is simply "released on conditions," "[r]ather than being released to a third-party custodian." *United States v. Mirabal*, 2009 WL 5201849, at *4 (D.N.M. Nov. 19, 2009); *see also* Jefri Wood, The Bail Reform Act of 1984 § I.B.1 (4th ed. 2022) (release to a halfway house falls under the Bail Reform Act's "catchall provision," Section 3142(c)(1)(B)(xiv)).[6]

2. The overall cluster of congressional legislation on the topic of criminal escape highlights the limited reach of Section 751's "custody" element.

In addition to being released to halfway houses, individuals are sometimes assigned to such facilities to serve the remainder of their terms of imprisonment. And years after it enacted Section 751, Congress enacted another statute providing that the "failure of a prisoner" to return to a halfway house "shall be

---

[6] In any event, pretrial release to a designated person under Section 3142(c)(1)(B)(i) does not subject someone to Section 751 either. When someone is placed in the "custody" of another person, the word custody is not used in the ordinary legal sense that pertains under Section 751. *See, e.g.*, *Custody, Black's Law Dictionary* (6th ed. 1990) ("custody" can mean "responsibility" for the "care [and] watch" of a person, such as with "[c]ustody of children"). Indeed, treating the placement of someone under the care and watch of another as a form of "custody" covered by Section 751 would "strain[] credulity." *United States v. Fico*, 16 F. Supp. 2d 252, 255 (W.D.N.Y. 1998); *accord United States v. Miranda*, 749 F. Supp. 1062, 1064 (D. Colo. 1990). It would mean that an individual released to the "custody" of his brother would commit the crime of escape if the brother asked him to come straight home after work, but instead he stopped at his sister's house for dinner. *See Fico*, 16 F. Supp 2d at 255.

deemed an escape" under Section 751. 18 U.S.C. § 4082(a), (c) (emphasis added).

The upshot of Section 4082 is this: In the one provision in which Congress expressly considered whether individuals can escape under Section 751 from a halfway house, it limited the coverage of the escape statute to people serving terms of imprisonment. Congress did not cover individuals released to halfway houses pending trial or on supervised release. Under the "negative implication" canon, which dictates that "[t]he expression of one thing implies the exclusion of others," this divergence in classification must be given effect. *See Jennings v. Rodriguez*, 583 U.S. 281, 300 (2018) (quoting Scalia & Garner, *supra*, at 107)).

The Government has previously observed that Congress enacted Section 4082 in response to *United States v. Person*, 223 F. Supp. 982 (S.D. Cal. 1963), where a district court ruled that an individual serving the end of his prison sentence at a halfway house was not in "custody" under Section 751. *See* Br. in Opp., *Mike*, *supra*, at 12–13. But this legislative history just underscores the force of the negative implication canon here. In *Person*, the district court compared the defendant to "parolee[s]," who (just like individuals nowadays on supervised release) "may have to live at a certain place, be home at a certain time each night, ask permission to own a car or leave the city," or so on. *Person*, 223 F. Supp. at 985. Surveying history and precedent, the court deemed it "obvious" that parolees cannot commit escape, for they are no longer under "physical restraint." *Id.* at 984–85. Yet Congress registered no disagreement with this supposition or

analysis; instead, it limited its coverage of halfway house residents to "prisoner[s]." 18 U.S.C. § 4082(a).

Two other federal escape-related offenses also complement Section 751. One punishes officers who permit the escape of "prisoner[s]" in their "custody," 18 U.S.C. § 755, while the second punishes those who conceal "prisoner[s]" who escape from "custody," 18 U.S.C. § 1072. Given that these statutes limit their reach to individuals serving prison sentences, it would make little sense for Section 751 to reach far beyond people who are incarcerated and to cover individuals not under a term of imprisonment or otherwise physically detained.

3. *Statutory context.* Section 751's statutory context further demonstrates that its "custody" element does not cover individuals on release at halfway houses. In particular, it is critical to remember that we are interpreting an "escape" statute. And as the Court made clear in *Bailey*, Section 751 should be interpreted according to how the crime of escape was understood at common law and captured over a half-century ago in the Model Penal Code ("MPC"). *See Bailey*, 444 U.S. at 407–08.

Those sources confirm that the crime of escape does not cover an individual who has been released to a halfway house. The treatises the *Bailey* Court relied on explain that the common law crime of escape was limited to absconding from "imprisonment" or "an actual arrest." 2 John Bishop, Criminal Law §§ 1093, 1094, at 812–13 (9th ed. 1923); *see also* 3 Francis Wharton, A Treatise on Criminal Law § 2009, at 2182 (11th ed. 1912) (escape is unlawful departure from "prison" or "bounds" that are dictated "by the jailer"). Consequently, an individual released from jail on a

"bail bond" was understood to have been "lawfully discharged," such that there could be "no escape." *See* 1 William Burdick, The Law of Crime § 308, at 464 (1946); *see also* 3 Francis Wharton, A Treatise on Criminal Law § 2007, at 2180 n.2 (11th ed. 1912). Releasing an individual from detention on the condition he reside at a halfway house is just another form of "lawful discharge," such that it could not have subjected someone to a prosecution for escape at common law.

Nor does the crime of escape, as explicated in the MPC, encompass individuals released to halfway houses. *See* Model Penal Code § 242.6 (1962). Escape under the MPC requires the individual be in "official detention," and that phrase excludes "constraint incidental to release on bail." *Id.* § 242.6(1). "Bail," in turn, is understood broadly in the MPC to include "pre-trial release mechanisms other than traditional bail" designed to ensure the defendant's appearance at trial. *Id.* § 242.8 cmt. 2 (Am. L. Inst. Proposed Official Draft 1962 and Revised Comments 1980). One such "pretrial release mechanism" is release to a halfway house.[7]

---

[7] One comment in the MPC indicates that a person can "escape" from "'constructive' custody." Model Penal Code § 242.6 cmt. 2. But "constructive custody" occurs under the MPC only where individuals are serving prison sentences and are in community settings to work, attend funerals, "visit sick relatives," or the like. *Id.* Therefore, someone living at a halfway house while *serving a prison sentence* could presumably commit escape under the MPC—as under Section 751 itself. *See supra* at 27–29; *United States v. Jones*, 569 F.2d 499, 500-01 (9th Cir. 1978). But the MPC does not deem an individual on pretrial release to be in "constructive custody."

4. *Purpose.* Congress's limited purpose in enacting the federal escape statute confirms that Section 751's "custody" element does not include release to a halfway house. As both this Court and the Government have recognized, Congress adopted Section 751 because escapes "are often violent," threatening "the lives of guards and custodians" and "carry[ing] in their wake other crimes." *United States v. Brown*, 333 U.S. 18, 21 n.5 (1948) (quoting Br. for the United States at 10, *Brown*, 333 U.S. 18 (1948) (No. 100)). In other words, the statute is focused on the violence that often attends breaking free from *physical restraint*—such as from prison or from the bodily control of law enforcement officers.

Unauthorized absences from halfway houses do not implicate this purpose. Walking out the door of a halfway house without permission is not a violent act, nor is simply failing to return. Nor are halfway house residents themselves especially dangerous. To the contrary, courts release individuals to halfway houses pretrial rather than keeping them in jail precisely because those individuals are not so dangerous as to require physical detention. *See* 18 U.S.C. § 3142(c)(1)(B).

Furthermore, the Government has ample other means to address unauthorized absences from halfway houses. Most directly, the Government may "initiate a proceeding for revocation of an order of release" and ask the court to return the individual to "detention." *See* 18 U.S.C. § 3148(b). A defendant can also be charged with a separate crime if he "fails to appear before a court as required by the conditions of release." *Id.* § 3146. And if an individual released to a halfway house leaves the facility and commits other crimes, the

Government can of course prosecute those offenses on their own terms.

5. *Lenity.* To the extent ambiguity remains as to the meaning of "custody" in the federal escape statute, the rule of lenity proscribes criminalizing unauthorized absences from a halfway house. The rule of lenity requires "ambiguities about the breadth of a criminal statute" to be "resolved in the defendant's favor." *United States v. Davis*, 588 U.S. 445, 464 (2019); *see also Wooden v. United States*, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (the rule of lenity requires "any reasonable doubt about the application of a penal law" to be "resolved in favor of liberty"). If "custody" remains ambiguous, interpreting it to make petitioner's conduct a felony violates this rule.

Indeed, the facts of this case place the absence of fair notice here in stark relief. As is often the case, the order setting petitioner's conditions of release contained a section explicitly addressed "to the defendant," providing "advice of penalties and sanctions." *See* Release Order at 3 (capitalization standardized). The section warned petitioner that violating his conditions of release could result in a "warrant for your arrest, a revocation of your release, an order of detention, a forfeiture of any bond, and a prosecution for contempt of court." *Id.* It never mentioned the possibility of an escape conviction. *See id.* Petitioner should not be subjected to a criminal charge that the court itself—when warning petitioner of possible consequences of failing to live up to his conditions of release—did not even seem to realize was possible.

CONCLUSION

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

Respectfully submitted,

Violet N. D. Edelman
Buck Glanz
Assistant Federal Public Defenders
FEDERAL PUBLIC DEFENDER
111 Lomas Boulevard NW
Suite 501
Albuquerque, NM 87102

Jeffrey L. Fisher
Counsel of Record
Easha Anand
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

June 12, 2024