No. 23-1310

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

BRIEF FOR DUE PROCESS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The escape statute, 18 U.S.C. § 751(a), criminalizes escapes from "any custody" imposed by federal law.

Is a criminal defendant released to a halfway house in "custody" under this statute?

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INTEREST OF AMICUS CURIAE[1]

Due Process Institute (DPI) is a nonprofit, bipartisan public-interest organization that works to honor, preserve, and restore procedural fairness in the criminal justice system. Due process is the guiding principle that underlies the Constitution's solemn promises to "establish justice" and to "secure the blessings of liberty."[2]

DPI opposes overbreadth and vagueness in criminal law. "Vague laws contravene the first essential of due process": that people are owed "fair notice of what the law demands of them."[3] Further, DPI opposes criminal laws that are drafted or interpreted to have an overly broad application — potentially subjecting persons to unfair arrest, prosecution, or conviction.

The decision below imperils these interests. The Tenth Circuit has taken a word with a narrow, precise original meaning — "custody" — and blurred it, injecting uncertainty into a once-unambiguous criminal statute. This Court can fix that double error.

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[1] No counsel for any party authored this brief in whole or part, and no person other than the amicus, its members, or its counsel financially contributed to its preparation or submission. Amicus gave notice of its intent to file this brief under Rule 37.2.

[2] U.S. Const., pmbl.

[3] *United States v. Davis*, 588 U.S. 445, 451 (2019).

SUMMARY OF ARGUMENT

By granting this petition, the Court can restore the term "custody" in the escape statute to its original meaning of physical confinement. Doing so will corral the excessive enforcement discretion that has led to unpredictable outcomes in the Second, Eighth, and Tenth Circuits.

Mr. Gross's petition shows that the use of the term "custody" in other statutes does not apply to persons released to halfway houses.[4] This brief shows that when the escape statute was enacted, habeas-related law and authorities uniformly understood "custody" to mean physical detention (or something closely resembling it). Since this Court's decision in *Jones v. Cunningham*,[5] the interpretation of "custody" in the habeas statutes has expanded, but that expansion doesn't change what the escape statute meant in 1930, and the reasons for the expansion don't apply when defining the boundaries of a criminal statute as opposed to a safeguard on liberty.

Indeed, habeas law provides a cautionary tale of what happens when courts interpret "custody" in a way that strays from its original meaning. In the 1960s, federal courts expanded the term in the habeas context to encompass any restriction on a person's "liberty to do those things which in this country free men are entitled to do."[6]

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4 *See* Pet. 24–27.

5 371 U.S. 236 (1963).

6 *Id.* at 243.

But these freedoms are innumerable, and many are restricted in one way or another; nuisance and tort law, for instance, restrict people's liberty by holding them accountable for how their actions affect others. The standard has thus proved contentless and confusing, leading to arbitrary outcomes. As Judge Newsom recently noted in an Eleventh Circuit concurrence, the things-free-people-can-do standard "confers nearly limitless discretion on individual judges."[7] Unbounded prosecutorial and judicial discretion entails arbitrary enforcement, which undermines the rule of law.

ARGUMENT

I. Habeas law reinforces that the meaning of "custody," as used in the 1930 escape statute, refers to close physical confinement.

The term "custody" in the escape statute[8] has the same meaning as when the statute was enacted[9] in 1930.[10] Custody means close physical confinement — that is, actual imprisonment or other physical detention, or the "power, legal or physical, of

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[7] *Clements v. Florida*, 59 F.4th 1204, 1218 (11th Cir. 2023) (Newsom, J., concurring).

[8] 18 U.S.C. § 751(a) (making it a crime to "escape" from "any custody under or by virtue of any process issued under the laws of the United States by any court").

[9] *Loper Bright Enters. v. Raimondo*, Nos. 22-451, 22-1219, 2024 U.S. LEXIS 2882, at *44 (June 28, 2024) ("[E]very statute's meaning is fixed at the time of enactment.").

[10] *United States v. Brown*, 333 U.S. 18, 21 (1948).

imprisoning or of taking manual possession" of a person.[11]

This interpretation is bolstered by looking at what "custody" meant in related statutes at the time the escape law was enacted.[12] This Court "presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts."[13]

These related statutes include the federal habeas statutes. Not only did those statutes use the term "custody" in the same sense that the escape statute does — to denote detention by the state — but they also supplied an important and widely recognized use of that term.

The habeas statutes stand out because they codify concepts developed over hundreds of years in the common law. And the concept of "custody" has been part of federal habeas law since the founding. In 1930, "custody" maintained its common-law meaning: close physical possession, or the power of imminently acquiring close possession.

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[11] *Custody*, *Black's Law Dictionary* (3d ed. 1933).

[12] *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting) ("typically 'only the most compelling evidence' will persuade this Court that Congress intended 'nearly identical language' in provisions dealing with related subjects to bear different meanings" (quoting *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 754 (1988))).

[13] *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988).

A. In 1930s habeas law, "custody" meant close confinement or physical possession.

The writ of habeas corpus traces its roots to England, where it was codified in a series of 1600s laws[14] referring to "imprison[ment],"[15] "sheriffs," and "gaolers"[16] — all terms suggesting that the writ applied to people in close physical confinement.

Then, in 1679, Parliament did something very revealing: it "gave jailers a presumptive three-day deadline for delivering the bodies of those 'in . . . their Custody.'"[17] This was in an era of transport by stagecoaches, carriages, and horseback. If "custody" meant anything other than close confinement — or, to borrow from the Latin, "hav[ing]" a person's "body"[18] — it is anyone's guess how jailers would've met that deadline, since they would have needed to find the relevant body to deliver it. Common-law authorities show that "custody" meant precisely that: the authorities to whom the writ was directed were presumed to have

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[14] *Boumediene v. Bush*, 553 U.S. 723, 741 (2008).

[15] 16 Car. 1 c. 1, § 8 (1628).

[16] 16 Car. 1 c. 10 (1640).

[17] *Clements*, 59 F.4th at 1219 (Newsom, J., concurring) (quoting 31 Car. 2 c. 2 (1679)).

[18] *Webster's New International Dictionary* 1121 (2d ed. 1944).

control over the person they were ordered to deliver because they were imprisoning them.[19]

This common-law understanding of "custody" survived its trip across the Atlantic. Early American lexicographers defined the term as referring to actual imprisonment,[20] and this Court followed suit. In its unanimous 1920 decision *Stallings v. Splain*,[21] the Court rejected a habeas petition from a man who was out on bail because, "[b]eing no longer under actual restraint," he was "not entitled to the writ of habeas

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[19] *See, e.g.*, *Clements*, 59 F.4th at 1219 (Newsom, J., concurring) ("[Blackstone] characterized habeas corpus as a remedy for 'removing the injury of unjust and illegal confinement' — 'confinement,' he said, being synonymous with 'imprisonment.'"); 1 Samuel Johnson, *A Dictionary of the English Language* 532 (1755) (defining "custody" by reference to "imprisonment").

[20] Noah Webster, *American Dictionary of the English Language* 516 (1828) ("[i]mprisonment; confinement; restraint of liberty"); *Black's Law Dictionary* 312 (1st ed. 1891) ("In a sentence that the defendant 'be in custody until,' etc., this term imports actual imprisonment. The duty of the sheriff under such a sentence is not performed by allowing the defendant to go at large under his general watch and control."); *accord* Black's Law Dictionary 309 (2d ed. 1910) (same); Black's Law Dictionary 493-94 (3d ed. 1933) (same). Although a statute's meaning is fixed at the time of enactment anyway, there's no reason to believe that the term "custody" has become wholly unrooted from its common-law origins; the eleventh edition of Black's Law Dictionary (2019) defines the relevant sense of "custody" — "physical custody" — as "[c]ustody of a person (*such as an arrestee*) whose freedom is *directly* controlled and limited." Black's Law Dict. 1386 (West 11th ed. 2019) (emphases added).

[21] 253 U.S. 339 (1920).

corpus."[22] That decision relied, in turn, on an 1885 precedent in which this Court (also unanimously) rejected a habeas petition from a man whose only restraint was that he couldn't leave Washington, DC.[23] "It is obvious that petitioner is under no physical restraint," the Court held, because — as is true of halfway-house residents who may come and go independently[24] — "[h]e walks the streets of Washington with no one to hinder his movements."[25] The petitioner's freedom to roam doomed his habeas petition, the Court explained, because he wasn't in "actual confinement."[26]

These holdings continued a long tradition and were consistent with state-court decisions reached almost a century earlier. "[T]he provisions of the habeas corpus act[] extend only to persons actually in prison, and not to persons under recognizance, and at large upon bail," held the South Carolina Constitutional Court of Appeal in 1804,[27] echoing an opinion from a Pennsylvania Supreme Court justice

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[22] *Id.* at 343.

[23] *Wales v. Whitney*, 114 U.S. 564, 566 (1885).

[24] Gail Caputo, Intermediate Sanctions in Corrections 181; *see also* Pet. at 6.

[25] *Wales*, 114 U.S. at 569.

[26] *Id.*

[27] *State v. Buyck*, 3 S.C.L. (1 Brev) 460 (S.C. Const. App. 1804).

three years earlier.[28] Courts would go on to interpret "custody" in the same way until the 1960s.[29] The interpretation was so orthodox that one 1950s commentator called it "basic to habeas corpus review."[30]

So "custody's" meaning in the 1930 habeas context is clear — and it wouldn't have covered people released to halfway houses because of their freedom to come and go from the house. Indeed, "[i]f there was any single feature that characterized the writ of habeas corpus in both its early statutory and common-law forms, it was the requirement that adult prisoners be subject to an immediate and confining restraint on their liberty."[31] People who could "come and go independently"[32] — like the person who could roam Washington in *Wales*, and the one out on bail in *Stallings* — weren't in

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[28] *Respublica v. Arnold*, 3 Yeates 263, 264 (Pa. 1801) (opinion of Yeates, J.) (pointing out that Pennsylvania's habeas statute doesn't "refer to any other cases, than where the party applying is in gaol, in *actual custody*" (emphasis added)).

[29] Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1354 (7th ed. 2015).

[30] Note, *Federal Habeas Corpus Review of "Final" Administrative Decisions*, 56 Colum. L. Rev. 551, 551 n.7 (1956); *see also* Note*, Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 865 (1957) ("Only a person in actual custody [was] entitled to the writ of habeas corpus.").

[31] Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 469 (1966).

[32] *See* Pet. at 6.

"custody" as that term was understood in 1930 because, despite other restrictions on their liberty, they were free to roam.

B. This Court's midcentury departure in habeas law from the original meaning of "custody" doesn't show what the term meant in 1930.

The meaning of "custody" in the habeas context evolved in midcentury judicial opinions. In the 1960s, when some criticized the Court as a "general haven for reform movements,"[33] this Court expanded "custody" to reach beyond "prison walls and iron bars" in *Jones v. Cunningham*.[34] To do so, it forged a new, broader definition of the term: "custody," in the habeas context, now encompassed any restriction on a person's "liberty to do those things which in this country free men are entitled to do."[35] Just three years later, the Tenth Circuit defined "custody" similarly in the escape-law context.[36]

But *Jones* and the decisions that followed do not change what "custody" meant thirty years earlier — much less in preceding centuries. Because the meaning of statutory terms is fixed at the time of enactment, *Jones* and its progeny do not change

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[33] *Reynolds v. Sims*, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting).

[34] *Jones*, 371 U.S. at 243.

[35] *Id.*

[36] *Read v. United States*, 361 F.2d 830, 831 (10th Cir. 1966) (defining "custody" as "any restraint … upon complete freedom").

what the term "custody" means in the federal escape statute.

None of this is to attack *Jones* or its modern offshoots. The habeas writ's "grand purpose" and traditional role as a safeguard of liberty may justify a flexible view of when habeas relief should be available, unbounded by textualist considerations.[37] This is so because the concept as it developed in common-law habeas cases predates the statutes, so giving undue weight to the phrasing used in the statutes could lead to a too-rigid (or even ahistorical) interpretation in that context.[38]

But the escape statute is a different context: like any criminal statute, it defines a crime — a justification for the state to *deprive* someone of liberty — rather than safeguarding liberty. That reversal makes all the difference. In statutes that define crimes, the rule-of-law principles of fair notice and predictable enforcement counsel *against* vagueness and enforcement discretion.

Regardless, *Jones*'s midcentury definition of "custody" provides no evidence of what a statute

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[37] *Jones*, 371 U.S. at 243.

[38] As Justice Brennan put it when this Court, overruling *Wales* and *Stallings*, extended *Jones* to hold that a person "released on bail on his own recognizance" was in "custody" under the habeas statutes, the writ should not be a "static, narrow, formalistic remedy." *Hensley v. Mun. Court, San Jose-Milpitas Judicial Dist.*, 411 U.S. 345, 349 (1973). Rather, the writ's nature "demands that it be administered with the initiative and flexibility essential to [e]nsure that miscarriages of justice within its reach are surfaced and corrected." *Id*. at 350.

enacted in 1930 meant at the time of enactment. That meaning was clear, in the habeas statute as elsewhere: "custody" meant — and so still means in the federal escape statute — actual physical restraint or the right to impose that restraint. It therefore does not cover people released to halfway houses.

II. Restricting the escape statute to close physical confinement avoids unpredictable outcomes that arise under the vaguer any-restriction-on-freedom standard.

There is every reason to assume that the escape statute uses "custody" in the same sense as pre-1960s habeas law. Indeed, the traditional definition is even more suited to the escape statute than the habeas statutes. Habeas is a civil, equitable remedy.[39] Habeas' equity roots further justify the writ's flexibility, explaining why some courts have eschewed "strict rules"[40] and crafted the writ to serve "the ends of justice."[41]

But the escape statute is different; it defines a crime. In that context, the traditional definition's bright lines would promote the liberty interests that underpin interpretation rules (such as the rule of lenity) applicable to criminal statutes: providing fair

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[39] *Schlup v. Delo*, 513 U.S. 298, 319 (1995).

[40] *Id.*

[41] *Id.* at 320.

notice and reducing the arbitrary outcomes caused by excessive enforcement discretion.[42]

Those interests are at risk. Courts have struggled to apply *Jones*'s "rudderless" and "hopelessly opaque" things-that-free-people-can-do inquiry.[43] As Judge Newsom recently noted, "the considerations that courts must consult" to apply *Jones* are "so multifarious" that "many, if not most, cases can be decided either way."[44] And so they are:

Case	Key Restrictions	Held to be in custody?
Nowakowski v. New York[45] (conditional discharge)	• One day of community service • Report regularly to the Criminal Court for a year	Custody
Poodry v. Tonawanda	• Banished from the Tonawanda	Custody

[42] *Snyder v. United States*, 219 L.Ed.2d 572, 586 (U.S. 2024) (rejecting the government's proposed definition of a term in a criminal statute because the definition lacked "clear lines" and would have deprived potential defendants of "fair notice"); *id.* at 589 (Gorsuch, J., concurring) (characterizing the majority's fair-notice concerns as an application of the "ancient rule of lenity").

[43] *Clements*, 59 F.4th at 1224 (Newsom, J., concurring).

[44] *Id.*

[45] 835 F.3d 210 (2d Cir. 2016).

Case	Key Restrictions	Held to be in custody?
Band of Seneca Indians[46] (Indians banished from tribal land)	Seneca Indian Reservation • Names removed from tribal rolls, Indian names taken away	
Piasecki v. Court of Common Pleas[47] (sex offender)	• In-person reporting to law enforcement • Criminal penalties for noncompliance • Lifetime GPS monitoring • Prohibition on living within a certain distance from schools, parks, and other areas frequented by children	Custody

[46] 85 F.3d 874 (2d Cir. 1996).

[47] 917 F.3d 161 (3d Cir. 2019).

Case	Key Restrictions	Held to be in custody?
Wilson v. Flaherty[48] (sex offender)	• In-person reregistration as a sex offender every 90 days due to "sexually violent offense" status • Required to notify authorities of any significant changes in residence, employment, vehicle ownership, or online contact information	No Custody
Corridore v. Washington[49] (sex offender)	• Mandatory lifetime electronic monitoring (LEM) via an ankle bracelet • Subject to real-time and recorded GPS tracking	No Custody

[48] 689 F.3d 332 (4th Cir. 2012).

[49] 71 F.4th 491 (6th Cir. 2023).

Case	Key Restrictions	Held to be in custody?
	• Required to notify authorities of changes to personal information, often in person. • Potential criminal penalties for non-compliance	
Dow v. Circuit Court[50] (DUI convict assigned to rehab)	• Mandatory attendance at a 14-hour alcohol rehabilitation program over a 3- to 5-day period • Cannot come and go as he pleases during the required class attendance	Custody
Clements v. Florida[51] (sex offender)	• Must appear in person at sheriff's office twice a year • Must report to a drivers' license	No Custody

[50] 995 F.2d 922 (9th Cir. 1993).

[51] 59 F.4th 1204 (11th Cir. 2023).

Case	Key Restrictions	Held to be in custody?
	office every time he changes residences • Must give 21 days' notice before leaving the country • Must give 48 hours' notice before establishing any residence in another state • No need for prior approval from government officials for changes in residence or employment	
Romero v. Sec'y, U.S. Dep't of Homeland Sec.[52] (immigrant on pre-deportation supervision)	• Required to appear in person at the government's request • Restricted from	Custody

[52] 20 F.4th 1374 (11th Cir. 2021).

Case	Key Restrictions	Held to be in custody?
	traveling outside Florida for more than 48 hours without notifying the government • Could be directed to a more stringent supervision program • Subject to detention upon violation of any supervision condition • Subject to a "Plan of Action" requiring her to depart the United States or be forcibly removed	

The *Poodry* holding that banishment from tribal land is sufficient "custody"[53] in the habeas context is especially notable since the penalty has nothing to do with imprisonment. There is more land outside the

[53] *Poodry*, 85 F.3d 874 (2d Cir. 1996).

tribal land than in it. But the *Poodry* court's reasoning, in rejecting formalistic constraints on what originated as an equitable remedy to protect liberty, is arguably consistent with one strand of the habeas tradition. A habeas petition is a last-resort effort to challenge restraints on liberty; the court noted that "the petitioner, although not held presently in physical custody, has no other procedural recourse for effective judicial review of the constitutional issues he raises."[54]

No such considerations apply when interpreting a criminal statute. The boundaries of criminal statutes must be clear, not vague; when in doubt, our system calls for erring on the side of liberty.

As Judge Newsom explained, "[d]etermining custody status under *Jones* and its progeny isn't — and will never be — remotely systematic"; it will "always be fraught with the risk of error — and, far worse, with the risk of manipulation."[55] So drifting from the ordinary meaning of "custody" might be acceptable when interpreting the habeas laws but not the escape law.

The Court should therefore grant Gross's petition and restore order and predictability to the escape statute.

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[54] *Id*. at 893.

[55] *Clements*, 59 F.4th at 1225 (Newsom, J., concurring).

CONCLUSION

When this Court adopted a flexible approach to interpreting "custody" in the habeas context, it gave federal courts vast latitude in defining the habeas remedy's scope. So petitioners and prosecutors fight endlessly over whether each new iteration of restraints on complete freedom constitutes a sufficient restraint on liberty to allow habeas relief, and the availability of such relief may depend on which court considers the petition.

Even if this unpredictability is reasonable in the context of habeas petitions, it's unacceptable for a statute that defines a crime. The Court should therefore grant Mr. Gross's petition, make clear that "custody" in the escape law retains its traditional meaning, and rein in the unpredictability and excessive enforcement discretion that results from using *Jones*' flexible definition of "custody" to expand the scope of a federal crime.

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