No. 23-1310

In the Supreme Court of the United States

DEAN GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner violated the federal escape statute, 18 U.S.C. 751(a), by absconding for more than four months from the halfway house where he had been required to stay until his trial.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is available at 2024 WL 488544. The memorandum opinion and order of the district court (Pet. App. 8a-68a) is not published in the Federal Supplement but is available at 2022 WL 1651063.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2024. A petition for rehearing was denied on April 29, 2024 (Pet. App. 69a). The petition for a writ of certiorari was filed on June 12, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was

convicted of escaping from custody, in violation of 18 U.S.C. 751(a). Judgment 1. He was sentenced to 27 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-7a.

1. In January 2021, U.S. Marshals Service officers went to a residence in Albuquerque, New Mexico, in search of a fugitive named Destiny Watkins. Presentence Investigation Report (PSR) ¶ 11. Petitioner emerged from a trailer located on the property, *ibid.*, and according to a later criminal complaint, denied that anyone else was in the trailer or that he knew Watkins, see Pet. App. 10a. The trailer turned out to contain Watkins and, among other things, two handguns, ammunition, and drug paraphernalia. PSR ¶¶ 12-14.

Petitioner was arrested and charged by complaint with making a false statement in a matter within the jurisdiction of the United States, in violation of 18 U.S.C. 1001. Pet. App. 10a-11a. A magistrate judge entered an order setting petitioner's conditions of pretrial release, which ordered him to be "placed in the custody of * * * La Pasada Halfway House" in Albuquerque, and subject to GPS monitoring. D. Ct. Doc. 15, at 2 (Feb. 25, 2021); see Pet. App. 5a, 11a; 18 U.S.C. 3142(c). The order stated that the halfway house "agree[d] to (a) supervise the defendant, (b) use every effort to assure the defendant's appearance at all court proceedings, and (c) notify the court immediately if the defendant violates a condition of release or is no longer in the custodian's custody." D. Ct. Doc. 15, at 2.

On April 21, 2021, petitioner told La Pasada staff that "he was leaving to take a letter to his probation officer." PSR ¶ 8. He then left the premises with his packed belongings, *ibid.*, and did not return despite be-

ing instructed by Pretrial Services to turn himself in, Pet. App. 11a. "While on absconder status," petitioner was charged by state prosecutors with aggravated assault upon a peace officer (with use of a firearm) and possessing a firearm or destructive device as a felon. PSR ¶ 17. The charges arose from an episode in June 2021 in Socorro County, New Mexico, during which petitioner shot at police officers before fleeing. *Ibid.* During the confrontation, an oxygen tank in his vehicle was struck by gunfire and exploded; petitioner was reportedly burned, his girlfriend was injured, and another man on the scene was killed. PSR ¶¶ 17, 55, 66; D. Ct. Doc. 130, at 19-20, 35 (Apr. 14, 2022).

Petitioner was apprehended by federal law enforcement on August 30, 2021. Pet. App. 11a.

2. A federal grand jury in the District of New Mexico returned a superseding indictment charging petitioner with making a false statement, in violation of 18 U.S.C. 1001(a)(2), and escaping from custody, in violation of 18 U.S.C. 751(a). Superseding Indictment 1-2. Section 751(a) prohibits a person from, *inter alia*, "escap[ing] or attempt[ing] to escape * * * 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." 18 U.S.C. 751(a).

Petitioner moved to dismiss the escape count, arguing (among other things) that he had not been in "custody" at La Pasada Halfway House within the meaning of Section 751(a). Pet. App. 8a-9a. Although he acknowledged that the Tenth Circuit had previously recognized, in *United States* v. *Sack*, 379 F.3d 1177 (2004), cert. denied, 544 U.S. 963 (2005), that a defendant's pretrial custody in a halfway house (there, also La Pasada) constitutes "custody" under Section 751(a), he asserted

that *Sack* was "wrongly decided." Pet. App. 15a. The district court denied the motion to dismiss. *Id.* at 67a.

Pursuant to Federal Rule of Criminal Procedure 11(a)(2), petitioner entered a conditional guilty plea to the escape count, which preserved his right to appeal the district court's denial of his dismissal motion. D. Ct. Doc. 97, at 7 (Dec. 22, 2021). The government agreed to dismiss the false-statement count in exchange for petitioner's guilty plea to the escape count. *Id.* at 7-8.

At sentencing, the district court accepted the presentence report's factual findings without objection and found, among other things, that petitioner had shot at police officers during his escape. D. Ct. Doc. 130, at 31, 34-37; see PSR ¶ 9 (noting the state prosecutors had dropped their charges against petitioner, "reserv[ing] the right to re-file" them upon resolution of his federal case). The court sentenced him to 27 months of imprisonment. Judgment 2.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-7a. It declined to consider petitioner's argument that *Sack* was wrongly decided, observing that "one panel of this court cannot overrule the judgment of another panel absent en banc consideration." *Id.* at 7a (brackets and citation omitted). The court accordingly affirmed the district court's judgment with respect to petitioner's challenge to *Sack*, *ibid.*, and dismissed his other claims as barred by the appeal waiver in his plea agreement, *id.* at 3a-6a.

ARGUMENT

Petitioner renews his contention (Pet. 21-32) that court-ordered placement in a halfway house pending trial is not "custody" for purposes of the federal escape statute, 18 U.S.C. 751(a). The Tenth Circuit correctly rejected that claim in *United States* v. *Sack*, 379 F.3d

1177 (2004), cert. denied, 544 U.S. 963 (2005), and petitioner's arguments to the contrary lack merit. Indeed, petitioner cannot show that his claim would succeed even in the only circuit, the Ninth, that has expressed any disagreement with *Sack*. This Court has denied several petitions for writs of certiorari presenting the same question and asserting the same circuit conflict, including in *Sack* itself.[1] The same course is warranted here.

1. Section 751(a) prohibits a person from escaping or attempting to escape from four different categories of custody:

> [1] from the custody of the Attorney General or his authorized representative, or [2] from any institution or facility in which he is confined by direction of the Attorney General, or [3] 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 [4] from the custody of an officer or employee of the United States pursuant to lawful arrest.

18 U.S.C. 751(a). Each of those clauses is separated from the others by the disjunctive term "or," and violating the statute accordingly requires proof only that the defendant escaped from any one of the categories of custody described.

Petitioner's conduct violated the plain terms of Section 751(a). First, his placement at La Pasada Halfway House fell squarely within the third category set forth

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[1] See *Goad* v. *United States*, 577 U.S. 1145 (2016) (No. 15-6450); *Mike* v. *United States*, 576 U.S. 1058 (2015) (No. 14-9016); *Edelman* v. *United States*, 571 U.S. 1175 (2014) (No. 13-569); *Sack* v. *United States*, 544 U.S. 963 (2005) (No. 04-7286).

above: a magistrate judge ordered that he be "placed in the custody of" La Pasada Halfway House pending trial, D. Ct. Doc. 15, at 2, pursuant to a statute authorizing the pretrial release of a defendant subject to the condition that he "remain in the custody of a designated person," 18 U.S.C. 3142(c)(1)(B)(i).[2]

Second, petitioner "escape[d]" from that custody. 18 U.S.C. 751(a). "Although § 751(a) does not define the term 'escape,' courts and commentators are in general agreement that it means absenting oneself from custody without permission." *United States* v. *Bailey*, 444 U.S. 394, 407 (1980). Petitioner does not appear to dispute that he satisfied that definition by absconding from La Pasada and refusing to return. See pp. 2-3, *supra*. And because his own conviction does not depend on the dubious proposition that a halfway-house resident could commit escape by taking a "detour on the way home from work," for example, or by violating release conditions unrelated to physical location, Pet. 3; see Pet. 15-17, this is not an appropriate case to address any concerns about whether such conduct would be considered an "escape."

As the Tenth Circuit explained in *Sack*, there is no basis for excluding pretrial custody in a halfway house from Section 751(a)'s "plain language." 379 F.3d at 1179-1180. The statute covers escapes from "any"

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[2] Petitioner asserts (Pet. 26) Section 3142(c)(1)(B)(i) "does *not* concern halfway houses" and his placement was authorized by other clauses of Section 3142(c)(1)(B). But clause (i) does authorize halfway-house placements, *Moreland* v. *United States*, 968 F.2d 655, 659-660 (8th Cir.) (en banc), cert. denied, 506 U.S. 1028 (1992), and it is clear that clause was the relevant provision here, compare 18 U.S.C. 3142(c)(1)(B)(i) with D. Ct. Doc. 15, at 2 (noting La Pasada's agreement to discharge the custodial duties set forth in clause (i)).

court-ordered custody, 18 U.S.C. 751(a), which suggests Congress intended the term "custody"—though it obviously must still refer to arrangements fairly described as custody, Pet. 24—to have a broad meaning. See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 218-219 (2008); *United States* v. *Edelman*, 726 F.3d 305, 309 (2d Cir. 2013), cert. denied, 571 U.S. 1175 (2014). And when Congress amended the statute in 1935 to add the language at issue here, it did so at the request of the Attorney General to ensure that escapes from pretrial custody, not just from postconviction confinement, were prohibited. See Act of Aug. 3, 1935, ch. 432, 49 Stat. 513; H.R. Rep. No. 803, 74th Cong., 1st Sess. 1-2 (1935); *United States* v. *Brown*, 333 U.S. 18, 25 (1948) (observing that amendments were "intended * * * to broaden the Act's coverage or to assure its broad coverage").

Accordingly, even if the classic case of escape may involve a convicted criminal sneaking or breaking out of a high-security prison, Section 751(a) unambiguously covers escapes from other, less restrictive custodial settings. See, *e.g.*, *United States* v. *Grayson*, 438 U.S. 41, 42-43 (1978) (escape from a "prison camp"); *Brown*, 333 U.S. at 20 (attempted escape during transport from jail to a penitentiary); *United States* v. *Wilke*, 450 F.2d 877, 877 (9th Cir. 1971) (escape from an "auto shop" located "outside the walls" of the prison), cert. denied, 409 U.S. 918 (1972), cited in *Bailey*, 444 U.S. at 407. Contrary to petitioner's assertion (Pet. 29), there is nothing anomalous about describing his months-long abscondment from the halfway house to which he was confined by court order as an escape from custody. Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 382 (1992) (describing concerns about "the transfer of [pretrial de-

tainees] to halfway houses, from which many escape"). Section 751(a) encompasses petitioner's conduct.

2. Petitioner's arguments to the contrary (Pet. 21-32) are misplaced.

a. Petitioner principally contends (Pet. 22) that "'custody'" in Section 751(a) is limited to "actual imprisonment, or other physical detention of a man's person against his will." Every court of appeals to consider that narrow reading of the statute has rejected it. See *United States* v. *Cluck*, 542 F.2d 728, 731 (8th Cir.) (collecting authority), cert. denied, 429 U.S. 986 (1976); see also, *e.g.*, *Edelman*, 726 F.3d at 309-310; *United States* v. *Depew*, 977 F.2d 1412, 1414 (10th Cir. 1992); *United States* v. *Keller*, 912 F.2d 1058, 1059 (9th Cir. 1990), cert. denied, 498 U.S. 1095 (1991); *United States* v. *Rudinsky*, 439 F.2d 1074, 1076-1077 (6th Cir. 1971). "Although there must be an escape from custody, it is not necessary that the escapee at the time of the escape be held under guard or under direct physical restraint or that the escape be from a conventional penal housing unit such as a cell or cell block; the custody may be minimal and, indeed, may be constructive." *Cluck*, 542 F.2d at 731.

The dictionaries and case law that petitioner cites do not undermine that judicial consensus. *Black's Law Dictionary* (3d ed. 1933), for example, describes the term "custody" as "very elastic" and identifies "actual imprisonment" as just one form of custody. *Id.* at 493-494; cf. Pet. 21-22. The Court had no occasion to settle the meaning of the word "custody" in *United States* v. *Bailey*, where it was "undisputed" that the defendants were in custody when they escaped. 444 U.S. at 407; cf. Pet. 23. Similarly inapposite is *Reno* v. *Koray*, 515 U.S. 50 (1995), see Pet. 25-26, which held that a different

term, "official detention," in a different statute, 18 U.S.C. 3585, does not include placement in a halfway house. 515 U.S. at 55-56, 65; see *Sack*, 379 F.3d at 1179-1180 (discussing *Koray*). Although *Koray* relied in part on court of appeals cases applying the term "custody" in Section 3585's predecessor, those cases involved people who were released on bond, not placed in halfway houses or similar facilities. 515 U.S. at 59 (citing, *e.g.*, *Polakoff* v. *United States*, 489 F.2d 727, 730 (5th Cir. 1974)).[3]

Petitioner's own interpretation of the statute finds no support in the text. His core contention is that a person's placement in a halfway house is not "custody" under Section 751(a) because such a person has some freedom to "come and go" from the facility for approved purposes. Pet. 22; see Pet. 6. But furlough and work-release programs give similar freedoms to many people who are subject to "actual imprisonment" or "physical detention," Pet. 22. See, *e.g.*, 18 U.S.C. 3622 (authorizing the temporary release of "a prisoner from the place of his imprisonment" for a litany of purposes including visiting relatives, employment, etc.). Petitioner offers no textual or commonsensical basis for the distinctions that he would draw. See *United States* v. *Goad*, 788 F.3d 873, 876 (8th Cir. 2015) ("[W]e see no reason to employ a different standard of custody based solely on subtle differences in the identity of the custodian[.]"), cert. denied, 577 U.S. 1145 (2016).

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[3] Petitioner notes (Pet. 25-26) that *Koray* cited a 1994 Bureau of Prisons policy document stating that "the government may not prosecute for escape in the case of an unauthorized absence" from a halfway house, 515 U.S. at 60 n.4 (citation omitted), but that statement was rescinded shortly thereafter, see *Sack*, 379 F.3d at 1180 n.3 (noting its absence from the 1997 version of the document).

Indeed, petitioner appears to accept that a halfway-house resident—even one subject to restrictions identical to petitioner's at La Pasada—*is* in "custody" under Section 751(a) provided he is "serving a term of imprisonment there," Pet. 12 n.2 (citing *Rudinsky*, 439 F.2d at 1075); accord Pet. 30 n.7, even though Section 751(a) prohibits pretrial and postconviction escapes equally, see p. 7, *supra*.

b. Statutory context likewise does not support petitioner. Although Section 751 is entitled "Prisoners in custody of institution or officer," see Pet. 23, Congress did not enact the title alongside the statutory language at issue here. See 49 Stat. 513. That title did not appear until Title 18 was recodified in 1948, Act of June 25, 1948, ch. 645, 62 Stat. 734-736, when Congress specified that "[n]o inference of a legislative construction is to be drawn" from the headings in that Title, *id.* § 19, 62 Stat. 862. Petitioner also appears to acknowledge that Section 751 extends to escapees who would not obviously fit the term "[p]risoners," such as pretrial detainees in jails. In any event, a statute's title can never "limit the plain meaning of the text," *Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947), and the coverage of Section 751's text unambiguously exceeds that of its title.

Petitioner cites (Pet. 24-25, 29) several statutes treating prisoners in physical detention as being in "custody," but those laws do not imply that such imprisonment exhausts the scope of "custody" under Section 751. And he misapprehends the significance of 18 U.S.C. 4082, in which Congress clarified that "[t]he willful failure of a prisoner * * * to return within the time prescribed to an institution or facility designated by the Attorney General," including a halfway house, "shall be

deemed to be an escape" under Section 751. 18 U.S.C. 4082(a); see 18 U.S.C. 4082(c). Petitioner errs in viewing Section 4082 to contain a negative implication that Section 751 fails to cover escapes like his.

"Virtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). And the context here does not support the negative implication that petitioner seeks to draw. As petitioner recognizes, Congress enacted the relevant provisions of Section 4082 specifically to disapprove a district-court decision taking the view that "an individual serving the end of his prison sentence at a halfway house" was not in custody for purposes of Section 751. Pet. 28 (discussing *United States* v. *Person*, 223 F. Supp. 982 (S.D. Cal. 1963)); see Act of Sept. 10, 1965, Pub. L. No. 89-176, § 4082(d) and (f), 79 Stat. 675. Section 4082's clarification that Section 751 is broad enough to encompass that conduct does not imply that Section 751, which was enacted 30 years earlier, contains distinctions that are absent from its plain text.

c. Departing from the Criminal Code, petitioner turns (Pet. 29-30) to the common law and the Model Penal Code. Even assuming the common-law offense of escape informs the meaning of "custody" under Section 751, it is far from clear that escapes like petitioner's were excluded from the common law's coverage. For instance, a treatise that petitioner cites as limiting common-law escape to "absconding from 'imprisonment' or 'an actual arrest,'" Pet. 29 (quoting 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 1094, at 812-813 (9th ed. 1923)), broadly defines "imprisonment" as "nothing

else but a restraint of liberty," Bishop § 1077, at 806; see *id.* at 805-806 (explaining "prison" may be "in the stocks, or in the street, or in the common jail, or the house of a constable or private person"). Other treatises cited in *Bailey*, 444 U.S. at 407, likewise do not support petitioner. See Rollin M. Perkins, *Criminal Law* 431 (1957) (explaining that someone "commits an escape if he willfully departs * * * even if he was not kept behind locked doors or in the immediate presence of a guard"); see also *id.* at 431 & n.29 (explaining that "an unauthorized departure from an 'honor farm'" or the abscondment of a "trusty [who was] permitted to be at large" are escapes); 1 William L. Burdick, *The Law of Crime* 461 (1946) (similar, and defining "[c]ustody" as "the detention or restraint of a person against his will").

Nor does the Model Penal Code shed light on Section 751, which significantly predates the Code. Petitioner notes that the Code's escape offense "requires the individual [to] be in 'official detention,'" which "excludes 'constraint incidental to release on bail.'" Pet. 30 (quoting Model Penal Code § 242.6(1) (1980)). Yet he offers no authority establishing that placement in the custody of a halfway house is a mere constraint incidental to release on bail (as periodic check-in requirements for someone otherwise at liberty might be) and not a form of official detention.

d. Finally, petitioner invokes (Pet. 31-32) presumed legislative purpose and lenity. To the extent petitioner is suggesting that Section 751(a) should be limited to escapes from "physical restraint," so as to target only escapes entailing violence, Pet. 31, he is poorly positioned to make that argument. He himself engaged in a shootout with police (apparently resulting in serious injuries and a fatality) after absconding from the halfway

house. See p. 3, *supra*. And as a more general matter, Congress could easily have been concerned (among other things) that attempts to apprehend halfway-house escapees—who will fear stricter custody upon their recapture—would likewise lead to violence.

In any event, violence was only one of the "more serious considerations" prompting Section 751(a)'s enactment. *Brown*, 333 U.S. at 21 n.5. Prohibiting escapes plainly serves broader interests in the administration of justice—interests that are not adequately served merely by revoking an escapee's conditional-release order or punishing his ultimate failure to appear for a court date, as petitioner suggests, see Pet. 31-32 (citing 18 U.S.C. 3146, 3148(b)).

Petitioner's claim (Pet. 32) that "the rule of lenity proscribes criminalizing unauthorized absences from a halfway house" is unsound. Lenity does not substantively constrain lawmaking; it provides that "grievous ambiguity or uncertainty" in a criminal law is resolved in favor of the defendant. *Ocasio* v. *United States*, 578 U.S. 282, 295 n.8 (2016) (citation omitted). Section 751(a) contains no such ambiguity. As this Court has observed, lenity "does not require distortion or nullification of the evident meaning and purpose of the legislation." *Brown*, 333 U.S. at 26 (citation omitted). Nor is he entitled to a special exemption from the text because he was not specifically warned that escaping from a halfway house would violate Section 751. See *Bryan* v. *United States*, 524 U.S. 184, 196 (1998) (noting "the traditional rule that ignorance of the law is no excuse").

3. Petitioner also errs in asserting (Pet. 9-13) that further review is warranted to address disagreement in the circuits. Like the Tenth Circuit in *Sack*, the Second, Sixth, and Eighth Circuits have recognized that the con-

ditions of residence at a halfway house ordinarily are sufficiently restrictive to constitute "custody" for purposes of Section 751(a). See *Edelman*, 726 F.3d at 309-310 (2d Cir.); *Rudinsky*, 439 F.2d at 1076-1077 (6th Cir.);[4] *Goad*, 788 F.3d at 876 (8th Cir.); see also *United States* v. *Gowdy*, 628 F.3d 1265, 1268 (11th Cir. 2010) (favorably citing *Sack*). As did the prior petitions for certiorari discussed above, p. 5 & note 1, *supra*, petitioner claims a conflict between those courts and the Ninth Circuit. That court, although agreeing with other circuits that "custody" under Section 751(a) "need not involve direct physical restraint," *Keller*, 912 F.2d at 1059, has adopted a narrower view of the types of restrictions that may constitute "custody." The Ninth Circuit has not, however, established a per se rule that residence in a halfway house can never constitute custody.

Instead, the Ninth Circuit has treated the restrictiveness of such placements as a factual question to be decided under the circumstances of each case. See *United States* v. *Burke*, 694 F.3d 1062, 1064 (2012); *United States* v. *Baxley*, 982 F.2d 1265, 1269 (1992); see also *Burke*, 694 F.3d at 1066 (Callahan, J., dissenting) ("We have eschewed bright-line rules defining 'custody' under § 751(a) and have consistently held that the definition varies 'in meaning when used in different contexts.' In the residential reentry center/halfway house

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[4] Petitioner attempts (Pet. 12 n.2) to distinguish *Rudinsky* on the ground that the defendant in that case was serving part of his term of imprisonment in the facility. But that does not undermine the Sixth Circuit's observation that because the facility's "restrictions deprived appellant of his freedom of movement and association," he was "in custody within the purview of 18 U.S.C. § 751." 439 F.2d at 1076-1077.

context, our case law has developed a definition of 'custody' by focusing on the circumstances of the release and the extent of the restrictions on the defendant's freedom.") (citations and footnote omitted) (quoting *Baxley*, 982 F.2d at 1269); *id.* at 1066 n.2 ("[T]he definition of 'custody' is [to be] analyzed on a case-by-case basis.").

In *Baxley*, for example, the court of appeals concluded that a defendant residing in a halfway house while on personal recognizance before trial was not in "custody" for purposes of Section 751(a). 982 F.2d at 1269-1270. The court observed that Baxley was "permitted * * * to come and go as he pleased during the day as long as he logged the time, duration, and purpose of his visits to the outside world." *Id.* at 1266. The court of appeals also noted that the district court had expressly declined to place Baxley in the facility's "custody" and had told Baxley that he could leave the facility altogether if he posted a bond or cash assurance. *Ibid.* And the court of appeals additionally observed that Baxley had attempted to check in with the facility several times after leaving and made no effort to hide his whereabouts. *Id.* at 1267. Reflecting its fact-intensive analysis, the court took the view that Baxley was not guilty of escape "given the circumstances of his residence at the half-way house." *Id.* at 1270.

In *Burke*, the district court placed the defendant in a halfway house as a condition of his supervised release, where (per the panel majority) he was required to "advise staff of [his] comings and goings" and had to obey certain "restrictions on telephone use or meal times," but was otherwise free to leave the facility. 694 F.3d at 1064. As in *Baxley*, the court expressly declined to enter a "custodial order." *Id.* at 1063; see *ibid.* (district

court stating that the placement order "was by no means, by letter or in spirit, a custodial order"). The court of appeals concluded that, under those circumstances, Burke was not subject to restraints that would amount to "custody." *Id.* at 1064-1065.

The Ninth Circuit thus has not categorically foreclosed the possibility that some halfway-house placements would be sufficiently restrictive to constitute "custody" under that court's understanding of the escape statute.[5] Petitioner's may well be such a case. Unlike the defendants in *Baxley* and *Burke*, petitioner was explicitly placed in the "custody" of La Pasada Halfway House, and he was permitted to leave the facility only for certain listed purposes or for "other activities approved in advance by the pretrial services office or supervising officer." D. Ct. Doc. 15, at 2. Petitioner was also subject to GPS monitoring, *ibid.*, unlike the defendants in *Burke*, 694 F.3d at 1063 (district court barring use of GPS), and presumably *Baxley* (which was decided in 1992).

Because this case was resolved by guilty plea, however, the record contains little other information about the restrictions imposed on petitioner at La Pasada. Cf. *Burke*, 694 F.3d at 1063 (district court reviewed "the rules and restrictions set forth in [the halfway house's] resident handbook"). That makes this case a particularly poor vehicle for considering the question presented, which asks "[w]hether or under what circumstances" placement in a halfway house may constitute

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[5] The absence of any Ninth Circuit cases revisiting the issue since *Burke* does not suggest otherwise. Cf. D. Ct. Doc. 130, at 27 (prosecutor stating at petitioner's sentencing that "the [New Mexico] United States Attorney's Office isn't charging every single person who leaves the pretrial custody of a halfway house with escape").

"custody" under Section 751(a), Pet. i, and thus provides another reason to deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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