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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government's brief reinforces the need for review. The Government acknowledges that the Tenth Circuit and other jurisdictions criminalize behavior under the federal escape statute that does not subject persons to prosecution in the Ninth Circuit. And the Government does not seriously dispute that the Tenth Circuit's expansive construction of 18 U.S.C. § 751(a) has sweeping implications. The Government does not even offer any definitive understanding of the statute. Instead, it says only that "the custody [required under Section 751(a)] may be minimal." BIO 8 (citation omitted). The very question presented, however, involves ascertaining what the minimum restraint on liberty is that qualifies as "custody" under the statute.

The unavoidable reality is that the circuits are intractably divided over whether the federal escape statute covers individuals who have been released to halfway houses. And the Tenth Circuit's holding that it does is wrong. Statutory text, structure, and history show that Section 751(a) does not reach beyond physical detention or serving a sentence of imprisonment. What's more, the consequences of expansively interpreting the statute are unacceptable. This Court should grant certiorari and reverse.

1. *Split.* The petition for certiorari made a simple point: Whatever the Government might have said in a few filings over the years about Ninth Circuit precedent, the Government's own actions exhibit the square and mature conflict over whether release to a halfway house constitutes "custody" under Section 751(a). That is, the Government prosecutes several hundred cases each year for "escaping" from halfway houses. And yet it has not charged a single individual

within the Ninth Circuit (by far the largest of all federal jurisdictions) for such conduct in the *32 years* since the Ninth Circuit decided *United States v. Baxley*, 982 F.2d 1265 (9th Cir. 1992). Pet. 14, 20-21. The Government does not dispute this reality. There can no longer be any doubt, therefore, that the circuits are split in every meaningful sense of that concept.

Ninth Circuit caselaw itself confirms that it categorically holds that release to a halfway house does not constitute "custody" under Section 751(a). Pointing primarily to wishful thinking in a dissenting opinion, the Government asserts that the Ninth Circuit follows merely a "case-by-case" approach to the question presented. BIO 14-15 (quoting *United States v. Burke*, 694 F.3d 1062, 1066 n.2 (9th Cir. 2012) (Callahan, J., dissenting)). The Ninth Circuit's *governing* precedent, however, establishes a blanket rule that a defendant "ordered by a court to reside at a halfway house pending trial is not in 'custody' for purposes of" the federal escape statute. *Burke*, 694 F.3d at 1064; *see also Baxley*, 982 F.2d at 1270; Pet. 10-11, 20.

Even if the Government were correct that Ninth Circuit precedent might theoretically leave room for some prosecutions for "escaping" from pretrial assignments to halfway houses, a conflict warranting review would still exist. As petitioner has explained and the Government does not deny, the Tenth Circuit and other courts hold that release to a halfway house categorically constitutes "custody" under Section 751(a). Pet. 10-13. In the Government's own words, however, the Ninth Circuit "has adopted a narrower view of the types of restrictions that may constitute 'custody.'" BIO 14. According to the Government, the

question whether release to a halfway house constitutes "custody" turns in the Ninth Circuit on the "circumstances of each case." BIO 14. Even if that were the extent of the difference between the courts of appeals (and it is not), that divergence would still warrant this Court's attention. Individuals should not be foreclosed from defending themselves in the Tenth Circuit and other courts against felony charges based on grounds available to them in the Ninth Circuit.

2. *Vehicle*. The Government gestures at two vehicle arguments, but neither is significant.

a. The Government says that "the record contains little other information about the restrictions imposed on petitioner at La Pasada." BIO 16. But nothing about the record here poses any obstacle to this Court's review. If this Court agrees with petitioner that release to a halfway house never constitutes custody, then his conviction must be reversed, for he is innocent. If, on the other hand, the Court were to hold that the question presented turns on particular facts and circumstances, the Court could apply that test to the current record. *See* Pet. 17-19. Or, if it concludes that the question presented turns on each facility's "resident handbook" or the like, BIO 16 (citation omitted)—a highly unlikely prospect, given that it would outsource defining the reach of a federal criminal statute to thousands of distinct private actors, *see* Pet. 15—the Court could vacate petitioner's conviction and remand for further proceedings under the proper construction of Section 751(a).

The Government also suggests petitioner could lose under a fact-specific approach. BIO 16. But that suggestion raises no vehicle problem either. The district court imposed, and the Tenth Circuit affirmed,

petitioner's conviction based on the categorical rule of *United States v. Sack*, 379 F.3d 1177 (10th Cir. 2004), that "an individual who resides at a halfway house pursuant to pretrial release is 'in custody' for purposes of 18 U.S.C. § 751(a)." Pet. App. 7a. Under any of the permutations above in which this Court rejects that categorical rule, this Court would resolve the circuit split and identify which facts, if any, matter in determining whether release to a halfway house constitutes "custody" under Section 751(a).

In any event, petitioner would likely prevail under a construction of Section 751(a) that turns on "the restrictiveness of [his] placement[]" at La Pasada. BIO 14. As is customary, his Release Order allowed him to come and go from La Pasada to work, as well as for personal activities. *See* Pet. 17-19. He was under no physical detention while living there. The Government notes that the district court called his placement "custody" at one point and imposed certain minor restrictions on his liberty. BIO 16. But as petitioner has already explained, neither the formal characterization nor the substance of his release meaningfully differentiated his situation from defendants' in the relevant Ninth Circuit cases or otherwise suggested he was in "custody." Pet. 17-19. Nor did the fact that he was "subject to GPS monitoring." BIO 16. Such monitoring is a commonplace condition of release—even of individuals released entirely on their own recognizance—and does not itself restrict a person's freedom of movement. Rather, it simply *tracks* those movements. *See* U.S. Courts, *Federal Location Monitoring* (2022), https://perma.cc/5QPR-Y4MM; Admin. Off. of the U.S. Courts, *Location Monitoring* 5 (2020), https://perma.cc/9BNH-WKZG.

b. The Government claims that petitioner is "poorly positioned" to argue that the federal escape statute is aimed at preventing violence that "attends breaking free from *physical restraint*" (Pet. 31) because he "apparently" resisted his apprehension after absenting himself from the halfway house. BIO 12. The circumstances relating to a person's apprehension, however, are different from those of his alleged "escape." And, by the Government's own account, those two things happened here several "months" apart. BIO (I). Nor was there any violence at all attendant to petitioner's absence from his halfway house. He simply left one day and did not return.

If anything, the Government's pointing to behavior unrelated to petitioner's alleged escape makes this a particularly suitable vehicle for considering the question presented. As the petition explained, "if an individual released to a halfway house leaves the facility and commits other crimes," the Government may well have reason to prosecute such offenses. Pet. 31-32. What the Government should not do is what it suggests it may have done here: pursue escape charges under an expansive conception of Section 751(a) as a stand-in for other allegations that might not stand up in court.

3. *Merits.* The Government's defense of the Tenth Circuit's decision falls flat.

a. In its sole attempt at a textual argument in support of the decision below, the Government notes that Section 751(a) is triggered by "any" type of custody. BIO 6-7. But as the Government admits in its next breath, the restrictions at issue must still "refer to arrangements fairly described as custody." *Id.* 7. And as to the meaning of "custody" itself, the

Government offers no definition. None. It does not even say whether it believes pretrial assignment to a halfway house always constitutes "custody" or is subject to some sort of facts-and-circumstances test.

Instead, the Government simply stresses that the magistrate judge stated he was placing petitioner "in the custody of" La Pasada. BIO 6 (quoting Order Setting Conditions of Release 2, ECF No. 15). But as petitioner has explained, that statement does not make it so. And even if a judge's own characterization of conditions of release mattered, the judge here made other statements indicating that he did *not* believe he placed petitioner in "custody." *See* Pet. 18-19. For instance, the magistrate judge ordered that the U.S. Marshal "release[]" petitioner, and the judge warned petitioner that any violation of the conditions attendant to his release could result in him going "back in custody." *Id.* 19 (first quoting Order Setting Conditions of Release 3, ECF No. 15; then quoting Tr. of Prelim. Examination/Detention Hr'g 32, ECF No. 46).

The Government also suggests that the magistrate judge assigned petitioner to the halfway house "pursuant to" a provision in the Bail Reform Act "authorizing the pretrial release of a defendant subject to the condition that he 'remain in the custody of a designated person.'" BIO 6 (quoting 18 U.S.C. § 3142(c)(1)(B)(i)). But the magistrate judge himself never invoked that provision when releasing petitioner. And for good reason: As petitioner has explained, the provision does not cover release to a halfway house or dictate that such a condition of release constitutes "custody" under Section 751(a). Pet. 26-27 & n.6 (collecting authority).

The Government responds by citing a single case: *Moreland v. United States*, 968 F.2d 655 (8th Cir. 1992) (en banc). BIO 6 n.2. That is a strange citation. The court of appeals there held that pretrial release to a halfway house does *not* sufficiently restrict a person's liberty to constitute "official detention" under 18 U.S.C. § 3585(b)—a statutory term Congress, the Government itself, and ultimately this Court understood to be interchangeable with "custody." *Moreland*, 968 F.2d at 658-60; *see also* Pet. 25-26 & n.5 (discussing *Reno v. Koray*, 515 U.S. 50 (1995)).

b. Statutory structure confirms that release to a halfway house is not "custody" under the federal escape statute. Most notably, 18 U.S.C. § 4082(a) provides that the failure of a "prisoner" to return as required to a halfway house "shall be deemed an escape" under Section 751. No comparable provision, however, exists with regard to individuals on pretrial or supervised release. The implication is clear: Unauthorized absences from halfway houses trigger the federal escape statute only if an individual is serving a sentence of imprisonment there.

The Government responds that distinguishing between individuals serving sentences and those who have been released "finds no support in the text" of Section 751(a). BIO 9. But as just explained, that is simply not so; the distinction is directly grounded in Section 4082(a)'s gloss on Section 751. So too in related escape statutes. *See* Pet. 29. Falling back, the Government maintains that the negative-implication canon depends "on context." BIO 11 (citation omitted). Fair enough. But as petitioner has explained, Section 4082 was enacted in response to a court decision reasoning from the premise that parolees (the

equivalent at that time of persons nowadays on supervised release) are not in custody. Pet. 28-29. Congress did not contest that premise, disagreeing instead only with the holding that "prisoners" serving their sentences in halfway houses are not in custody under Section 751(a). *Id.*

c. Historical sources reinforce this analysis. Dictionaries when Section 751(a) was enacted defined "custody" to be limited to physical detention or serving a sentence. *See* Pet. 21-23. The Government offers no meaningful response. Federal habeas law at that time—perhaps the most prominent other statutory usage of the concept of "custody"—also followed the same rule. *See* Br. of Due Process Institute 3-9; *Clements v. Florida*, 59 F.4th 1204, 1219-20 (11th Cir. 2023) (Newsom, J., concurring).

Contemporaneous treatises are in accord. The Government quotes some passages indicating that people not in prison or jails can still be in custody. BIO 11-12; *see also id.* 7 (citing cases holding same). But those passages say nothing more than what Section 4082 provides—namely, that individuals who are serving prison sentences and are temporarily in community settings (for work or the like) were still considered to be in what is sometimes called "constructive custody." *See* Pet. 30 n.7. None of the authorities suggests that individuals *on pretrial release* with conditions like residing at a halfway house were traditionally considered to be in custody.

Nor does the Government successfully push back against the Model Penal Code, which this Court has also referenced when construing Section 751(a). *See United States v. Bailey*, 444 U.S. 394, 407-08 (1980). The Government recognizes that the Code has long

excluded "constraint incidental to release on bail" from its model escape statute. BIO 12 (quoting MPC 242.6(1) (1962)). But the Government suggests that assignment to a halfway house is not "a mere constraint incidental to release on bail." *Id.* That is wrong. Under the Bail Reform Act, a court may "either (1) 'release' the defendant on bail or (2) order him 'detained' without bail." *Koray*, 515 U.S. at 57 (quoting 18 U.S.C. §§ 3142(a), (c), (e)). Pretrial assignment to a halfway house is unquestionably the former. Such an assignment is nothing more than a "condition[]" of release on bail. 18 U.S.C. § 3142(c); *see also Koray*, 515 U.S. at 57 (describing "residence in a community treatment center" as a "condition[]" of bail).

4. *Importance.* The "far-reaching consequences" of the Tenth Circuit's construction of the federal escape statute clinch the need for review. *See Van Buren v. United States*, 593 U.S. 374, 393 (2021). The petition explains that if the Tenth Circuit's any-restraint-on-complete-freedom test is right, then virtually every individual released on bond pending trial is "in custody" under the escape statute. Pet. 16-17. That creates a massive overcriminalization problem. *Id.*

The Government offers no meaningful response. It suggests that periodic check-in requirements "might be" different from restrictions attendant to living at a halfway house. BIO 12. But the Government carefully stops short of saying that such requirements—or any other slight restraint on liberty, such as a requirement to abide by parental curfews, *see* Pet. 15-17—are *actually* legally different. Much less does the Government offer any definition of "custody" or other rule that distinguishes such requirements from release to a halfway house.

Disinclined to give ground regarding Section 751(a)'s conception of "custody," the Government suggests that something like taking an unauthorized detour might not satisfy the statute's "escape" element. BIO 6. But the Government cites no authority in support of that suggestion. And it cannot deny that all the "escape" element requires is that the defendant left federal custody "without permission." *Bailey*, 444 U.S. at 407. Consequently, if the Tenth Circuit's sweeping conception of "custody" is correct, then any minor transgression of a condition of pretrial or supervised release violates the federal escape statute, triggering a potential five-year prison sentence. *See* Pet. 15-17. All that stands between such everyday occurrences and such prosecutions is prosecutorial discretion. *See* BIO 16 n.5.

In that respect, this case presents the latest example of the Government's penchant for maximally interpreting federal criminal laws, while asking this Court to trust its exercise of discretion. To this "familiar plea," the Court now has a "just-as-familiar response": "We cannot construe a criminal statute on the assumption that the Government will use it responsibly." *Dubin v. United States*, 599 U.S. 110, 131 (2023) (internal quotation marks and citation omitted). All the more so where, as here, the Government is unwilling even to provide fair notice of precisely what conduct it believes the statute covers in the first place. Certiorari should be granted.

CONCLUSION

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

Respectfully submitted,

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