No. 12-

# In The
# Supreme Court of the United States

LINCOLN D. CHAFEE, IN HIS CAPACITY AS GOVERNOR OF THE STATE OF RHODE ISLAND,
*Petitioner*,

v.

UNITED STATES OF AMERICA, *ET AL.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Twice this Court has noted, but not decided, the question whether, as a matter of constitutional federalism, the United States may use a writ of habeas corpus *ad prosequendum* to seize a state prisoner out of state custody while his state sentence is still being served. *See United States v. Mauro*, 436 U.S. 340, 363 & n.28 (1978); *Carbo v. United States*, 364 U.S. 611, 621 n.20 (1961). That open question has produced a split in the circuits and a sharp division in the en banc First Circuit here over the proper coordinated operation of two federal statutes, the Interstate Agreement on Detainers Act, 18 U.S.C. app. 2, and the habeas corpus statute, 28 U.S.C. § 2241. The question presented is:

Whether, after initiating a custody request for a state prisoner under the Interstate Agreement on Detainers Act, 18 U.S.C. app. 2, the federal government may nullify the State's exercise of its statutory right to disallow that custody request by resort to a writ of habeas corpus *ad prosequendum*.

## PARTIES TO THE PROCEEDING

Petitioner Lincoln D. Chafee, in his capacity as Governor of the State of Rhode Island, was the intervenor-appellant-petitioner in the court of appeals.

The United States of America was the plaintiff in the district court and appellee-respondent in the court of appeals.

Jason Pleau was the defendant in the district court and appellant-petitioner in the court of appeals.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES:**

**STATUTES AND REGULATIONS:**

**OTHER AUTHORITIES:**

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# Supreme Court of the United States

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Lincoln D. Chafee, in his capacity as Governor of the State of Rhode Island, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

## OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-47a) is reported at 680 F.3d 1 (2012). The vacated panel decision of the court of appeals (App.,

*infra*, 48a-82a) is no longer reported. The district court decision (App., *infra*, 83a-91a) is unreported, but is available at 2011 WL 2605301.

## JURISDICTION

The en banc court of appeals entered its judgment on May 7, 2012. App., *infra*, 1a. On July 30, 2012, Justice Breyer extended the time for filing a petition for a writ of certiorari to and including August 21, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 104a-120a.

## STATEMENT OF THE CASE

This case involves the interplay of two federal statutes and the circuit conflict that has arisen from efforts to reconcile their overlapping operation. More specifically, the courts of appeals have offered contradictory answers to a question previously reserved by this Court: whether, notwithstanding its statutory obligations under the Interstate Agreement on Detainers Act ("Detainers Act"), 18 U.S.C. app. 2, the United States may use the specialized writ of habeas corpus *ad prosequendum*, 28 U.S.C. § 2241(c)(5), to force a State to surrender control over a state prisoner while that prisoner is still serving a lawfully imposed state sentence. That question implicates not only the operation of two important federal statutes invoked thousands of times annually,

but also foundational principles of constitutional federalism.

In *United States v. Mauro*, 436 U.S. 340 (1978), this Court ruled that the Detainers Act "preserve[d] previously existing rights of the sending States" to refuse to make a prisoner available in response to a custody request sought through a writ of habeas corpus *ad prosequendum*, *id.* at 363 & n.28, but left open what the scope of that pre-Detainers Act right was, *id.* This Court similarly left open the question of the States' ability to resist a custody request in the form of an *ad prosequendum* writ in *Carbo v. United States*, 364 U.S. 611 (1961), *id.* at 621 n.20. At the time of *Carbo*, the courts of appeals were uniform in holding that, as a matter of federalism, such inter-sovereign requests for the custody of an individual already serving a state sentence must be addressed as a matter of comity.

This Court's decision in *Mauro* and, in particular, the continued lack of definitive resolution by this Court of the States' ability to decline federal requests made through *ad prosequendum* writs has led to a sharp division in circuit authority. As exemplified by the en banc majority's and dissent's diametrically opposed readings of the same language in *Mauro*, the courts of appeals have issued contradictory holdings concerning the ability of the United States to use the *ad prosequendum* writ to override a State's disallowance of a request for custody—a right that is textually guaranteed to the States by the Detainers Act. The majority here, along with the Third and Fourth Circuits, have held that *Mauro* actually answered the very question it reserved. In those

circuits, the United States can use the writ of habeas corpus *ad prosequendum* to override a custodial State's exercise of its statutory right to deny custody to a requesting State. The dissent below agreed with the Second Circuit, however, that *Mauro* left that question open, and further recognized that nothing in the text of the Detainers Act or in the constitutional structure of dual sovereignty permits the United States to disregard its statutory obligations or to nullify the States' long-recognized right—a right expressly preserved in the interstate compact the United States joined—by resort to an *ad prosequendum* writ.

Only this Court can resolve that circuit conflict over what *Mauro* means and can definitively determine the law governing States' obligations to accede to *ad prosequendum* writs used by the United States. This Court's intervention is critical to bring uniformity to the meaning of an interstate compact to which 48 States and the United States are parties and which superintends the operation of thousands of detainers annually.

1. The Detainers Act is a federal statute codifying an interstate compact, the Interstate Agreement on Detainers ("Compact"), that "prescribes procedures by which a member State may obtain for trial a prisoner incarcerated in another member jurisdiction and by which the prisoner may demand the speedy disposition of certain charges pending against him in

another jurisdiction." *Mauro*, 436 U.S. at 343.[1] A detainer is "a legal order that requires a State in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried by a different State for a different crime." *Alabama v. Bozeman*, 533 U.S. 146, 148 (2001).

Prior to the Compact, the States employed varied, ad hoc, and unpredictable systems for implementing detainers that had "produce[d] uncertainties which obstruct[ed] programs of prisoner treatment and rehabilitation." 18 U.S.C. app. 2 § 2, art. I. The Compact substituted in their place a uniform, "simple and efficient means of obtaining prisoners from other States." *Mauro*, 436 U.S. at 355 n.23; *see* 18 U.S.C. app. 2 § 2, art. I ("[T]he purpose of this agreement [is] to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers."). The Compact also reduced detainers' interference with "'proper sentencing, as well as proper correctional treatment'" and rehabilitation programs in the custodial State. *Mauro*, 436 U.S. at 360.

In 1970, Congress enacted the Detainers Act, 18 U.S.C. app. 2, which joined the United States as a full and equal party to the Compact. Recognizing the many advantages arising from "'this vitally needed system of simplified and uniform rules for the disposition of pending criminal charges and the

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[1] The only two States not to have joined are Louisiana and Mississippi.

exchange of prisoners'" between sovereign jurisdictions, *Mauro*, 436 U.S. at 355 (quoting 116 Cong. Rec. 38840 (1970) (statement of Sen. Hruska)), Congress defined the United States as a party "State" to the Compact. 18 U.S.C. app. 2 § 2, art. II(a) ("'State' shall mean a State of the United States [and] the United States of America[.]"). In so doing, Congress "enact[ed] the Agreement into law in its entirety, and it placed no qualification upon the membership of the United States." *Mauro*, 436 U.S. at 356.

The Detainers Act's provisions are triggered "when a 'detainer' is filed with the custodial (sending) State by another State (receiving) having untried charges pending against the prisoner." *Mauro*, 436 U.S. at 343. Upon lodging of a detainer, Article IV of the Act generally "gives a State the right to obtain a prisoner for purposes of trial," *Bozeman*, 533 U.S. at 151, through the submission of a "written request for temporary custody" to the State in which the prisoner is incarcerated. The Act, however, expressly permits the Governor of the custodial State 30 days in which to "disapprove the request for temporary custody or availability." 18 U.S.C. app. 2 § 2, art. IV(a).

If the sending State agrees to surrender custody of its prisoner, the receiving State must commit to "try the prisoner within 120 days of his arrival" and not to "return the prisoner to his 'original place of imprisonment' prior to that trial." *Bozeman*, 533 U.S. at 151. While the prisoner is held by the receiving State, he is simultaneously "deemed to remain in the custody of and subject to the jurisdiction of the sending State." 18 U.S.C. app. 2 § 2, art. V(g).

Article VII of the Detainers Act provides for centralization of information regarding the processing of detainers within each State, facilitating information exchange and expediting administration of transfer requests. 18 U.S.C. app. 2 § 2, art. VII.

The rights and guarantees embodied in the Detainers Act's "cooperative procedures" are designed to minimize the disruption that a receiving State's detainer and trial processes cause to the custodial State's execution of its own criminal sentence and rehabilitative efforts. 18 U.S.C. app. 2 § 2, art. I. In joining the Compact, Congress directed federal officials to "cooperate" with the States "in enforcing the agreement and effectuating its purpose." *Id.* § 5.

2. Pursuant to 28 U.S.C. § 2241, federal courts are authorized to issue writs of habeas corpus, including not only the "Great Writ *** for an inquiry into the cause of restraint," but also lesser writs like the writ of habeas corpus *ad prosequendum*. *Carbo*, 364 U.S. at 615. The *ad prosequendum* writ is issued when it "is necessary to bring [a prisoner] into court *** for trial." 28 U.S.C. § 2241(c)(5). Such writs contrast with the now-simplified detainer process under the Detainers Act. A detainer may be issued by a prosecutor without resort to court order, and it can be used to place a "hold" on a prisoner without, as is the case with a writ, demanding an immediate transfer of custody. *Mauro*, 436 U.S. at 358.

Once the United States activates the Detainers Act by lodging a detainer, a subsequent writ of habeas corpus *ad prosequendum* is deemed a

"'written request for temporary custody'" subject to the provisions of the Act. *Mauro*, 436 U.S. at 362.

3. In September 2010, the State of Rhode Island sentenced Jason Pleau to 18 years' imprisonment for probation and parole violations related to the robbery and murder in Rhode Island of David Main, which occurred in a parking lot outside of a bank. App., *infra*, 3a-4a, 50a-51a. Rhode Island also charged Pleau with state murder and robbery counts for that same crime, to which he offered to plead guilty and accept a State sentence of life in prison without parole—Rhode Island's harshest penalty. *Id.* at 17a-18a n.9; *see* R.I. GEN. LAWS § 11-23-2 (2010).

In November 2010, the federal government lodged a detainer against Pleau with Rhode Island prison officials "[p]ursuant to the provisions of the Interstate Agreement on Detainers Act[.]" App., *infra*, 122a. The next month, the federal government indicted Pleau for charges arising from the same crime for which state murder and robbery charges were already pending. Specifically, Pleau was federally charged with "robbery affecting interstate commerce," use of a firearm during a crime of violence, death resulting, and related charges, for having shot an individual "who was on his way to [a] bank." *Id.* at 50a-51a.

The United States then presented a written request to Rhode Island prison officials for a temporary transfer of custody over Pleau under Article IV of the Detainers Act. App., *infra*, 128a-131a. Because the United States indicated that it was contemplating the death penalty for Pleau,

Governor Chafee exercised Rhode Island's statutory right under Article IV(a) of the Detainers Act to disapprove the transfer of custody, based on the State's longstanding opposition to the death penalty. *Id.* at 132a-133a.

4. To override Rhode Island's exercise of its statutory right under the Detainers Act, the United States petitioned for a writ of habeas corpus *ad prosequendum* in the United States District Court for the District of Rhode Island. The United States "concede[d] in its petition," and the district court agreed, that the Detainers Act would continue to govern the United States' exercise of temporary custody over Pleau. App., *infra*, 89a & n.4. The district court nevertheless ordered Rhode Island to surrender Pleau to the United States in contravention of the Governor's Article IV(a) decision. *Id.* at 90a-91a.

5. Pleau both appealed and petitioned the Court of Appeals for a writ of prohibition to bar enforcement of the *ad prosequendum* writ. App., *infra*, 5a.

The court of appeals originally granted a stay of the writ of habeas corpus *ad prosequendum* and allowed the Governor to intervene as an appellant-petitioner. App., *infra*, 18a.

The panel subsequently both reversed the district court and granted a writ of prohibition. App., *infra*, 72a-74a. Recognizing at the outset that the case raised questions "'of great public importance, and [was] likely to recur,'" *id.* at 56a, *see id.* at 60a-61a,

the court held that, "once the federal government has put the gears of the [Detainers Act] into motion, it is bound by the [Act's] terms, including its express reservation of a right of refusal to the governor of the sending state," *id.* at 50a.

The panel noted that "[i]t is uncontroversial that a governor may block a prisoner's transfer to a receiving state other than the United States" under Article IV(a) of the Detainers Act, and that the Act applies Article IV(a) "with equal force to the United States." App., *infra*, 71a. Accordingly, "the United States certainly cannot base its claim for custody of Pleau on a blatant attempt to sidestep the [Detainers Act]—a federal law that the United States itself invoked when it filed a detainer with the state of Rhode Island." *Id.* at 72a. "Holding the United States to an agreement that was accepted by Congress" and that the Executive Branch chose to "invoke[] *** to gain custody of Pleau," the court concluded, "neither violates the Supremacy Clause nor upsets the post-Civil War balance of power between the states and the federal government." *Id.* at 73a n.9. Judge Boudin dissented. *Id.* at 75a-82a.

6. a. The United States petitioned for rehearing en banc, arguing that the Detainers Act's grant of a right of refusal to custodial States was an "empty shell" with no operative force. *See* United States' Pet. for Panel Rehearing and Rehearing En Banc, at 7, *United States v. Pleau*, No. 11-1775 (1st Cir. Nov. 9, 2011) (U.S. Reh'g Pet.). A sharply divided en banc court of appeals reversed. App., *infra*, 1a-47a.

By a vote of 3 to 2, a majority held that the United States, after choosing to invoke the Detainers Act's provisions and continuing to seek temporary custody within its framework, could nevertheless employ the *ad prosequendum* writ to bypass the custodial State's exercise of its own rights under the Detainers Act. App., *infra*, at 9a-14a. In so holding, the majority acknowledged this Court's holding in *Mauro* that, once the United States invokes the Detainers Act, it cannot use the *ad prosequendum* writ to circumvent the Act's time limits for trial. *Id.* at 8a (citing *Mauro*, 436 U.S. at 361-364). The majority nonetheless read *Mauro* as rejecting any limits on the federal government's "authority to compel a state to surrender a prisoner" pursuant to an *ad prosequendum* writ. *Id.* at 9a. The majority reasoned that, under the Supremacy Clause, the habeas statute trumps the State's exercise of its rights under another federal statute, the Detainers Act. *Id.* at 10a-12a. The majority deemed it "patent" that a State lacked the authority to refuse an *ad prosequendum* writ, even if that right is itself codified in federal law, because the "Supremacy Clause operates in only one direction." *Id.* at 10a, 11a. It recognized, however, that the Second Circuit had come to the opposite conclusion on this same question. *Id.* at 12a.

b. Judges Torruella and Thompson dissented. They explained that the express terms of federal law empower the Governor to refuse a "'written request for temporary custody or availability,'" and that *Mauro* held that an *ad prosequendum* writ issued after the United States files a detainer constitutes just such a "'written request.'" App., *infra*, 15a-16a.

In the dissent's view, the majority's invocation of the Supremacy Clause was misplaced because Rhode Island exercised its right to disapprove custody under Article IV(a) of the Detainers Act, which "is a *federal statute*, just like the habeas statute is a *federal statute*," and thus "the issue here is how two *federal statutes* interact, a determination in which the Supremacy Clause plays no part." *Id.* at 21a.

The dissent further emphasized *Mauro*'s holding that the United States is "*fully* bound by *all* the provisions of the" Detainers Act. App., *infra*, at 30a. The dissent pointed out that *Mauro* did not in any way reject "the possibility that a state could disobey an *ad prosequendum* writ that was treated as a request for custody." *Id.* at 35a-36a. *Mauro* merely rejected the United States' argument that treating an *ad prosequendum* writ as a written request under the Agreement would present a Supremacy Clause problem. *Id.* at 36a. In so doing, the dissent noted, this Court had expressly reserved the question of whether and to what extent States could disapprove a custody request in the form of an *ad prosequendum* writ, since the Detainers Act preserved and retained whatever pre-Act authority the States had in that regard. *Id.* at 35a-37a (citing *Mauro*, 436 U.S. at 363 & n.28).

The dissent noted, moreover, that the majority's decision conflicted with the law of the Second Circuit, which was "clearly favorable to Governor Chafee's position." App., *infra,* at 39a-40a (citing *United States v. Scheer*, 729 F.2d 164, 170 (2d Cir. 1984)). Finally, the dissent concluded that the "consequences of allowing the United States to avoid its obligations

under a validly-enacted compact are surely graver than the consequences of allowing Rhode Island's justice system to prosecute Pleau." *Id.* at 39a.

7. The en banc court of appeals divided by the same 3 to 2 vote in denying the Governor's and Pleau's joint request to stay issuance of the mandate, a request also denied by this Court. On May 30, 2012, the United States took custody of Pleau and is holding him pursuant to the continued operation of the *ad prosequendum* writ. On June 18, 2012, the United States filed a Notice of Intention to Seek the Death Penalty against Pleau. App., *infra*, 140a-147a.

## REASONS FOR GRANTING THE WRIT

The federal government wants to have its cake and eat it too, enjoying all the benefits of the Detainers Act's expedited and harmonized processes for detainers, while invoking the *ad prosequendum* writ to avoid its obligations and responsibilities codified in federal law. The circuits are as split as the en banc first Circuit was in its decision here over whether *Mauro* and the Supremacy Clause allow the federal government to nullify a sovereign State's exercise of rights that Congress has textually preserved under federal law.

It is an odd conception of federal supremacy that would license the United States to use one federal statute (the habeas corpus law) to escape expressly binding provisions of another federal statute (the Detainers Act). But if that is what this interstate compact now means—and if the Supremacy Clause means the United States never has the same

contractual obligation to keep its word as the States do—then Governor Chafee and Rhode Island, along with the Governors of the 47 other State signatories to the Compact, need to know that now. If the United States is not the equal partner that Congress promised it would be, then the States will need to adjust their compact and contractual commitments accordingly. *See* Br. of *Amici Curiae* Nat'l Governors Assoc. and Council of State Gov'ts in Support of Intervenor Lincoln D. Chafee Seeking Reversal of the District Court's Decision, *United States v. Pleau*, No. 11-1775 (1st Cir. Feb. 16, 2012). The current regime, in which the meaning and operation of the Detainers Act and the habeas statute differ from State to State and circuit to circuit, is untenable. Equally unpalatable is the Executive Branch's and en banc majority's complete disregard of the States' statutory, Compact, and historic rights with respect to prisoners in state custody serving properly imposed state criminal sentences—a disregard that is wholly incompatible with the Constitution's federalist system of *dual* sovereignty.

## I. THE EN BANC COURT'S DECISION TREADS HEAVILY ON BASIC PRINCIPLES OF FEDERALISM.

As a result of their contradictory readings of *Mauro*, and their sharply opposed understandings of the intersected operation of two federal statutes, the courts of appeals have produced conflicting rules of law governing the role of *ad prosequendum* writs under the Detainers Act. There can be only one rule for how post-detainer writs of habeas corpus *ad*

*prosequendum* are treated under federal law. And only this Court can settle that question.

But before addressing that inconsonance in the law, it is worth taking stock at the outset of what exactly the United States is doing here, now with the blessing of the court of appeals, and how the United States' and court's position stands principles of constitutional federalism on their head. There is, after all, no dispute that the plain text of a federal statute that Congress made binding on the United States authorizes the Governors of signatory States to "disapprove the request for temporary custody" submitted under the Detainers Act. 18 U.S.C. app. 2 § 2, art. IV(a).

Indeed, the United States has never disputed that *it* has the power under the Detainers Act to do exactly what Governor Chafee did here and to deny States' requests for custody under this same provision. *See* 18 U.S.C. app. 2 § 2, art. IX, § 3 (defining the U.S. Attorney General as the "Governor" for purposes of the United States' role under the Compact).

Nor does the United States dispute that Article IV(a) means exactly what it says and thus Governors "may disapprove" custody requests by every other signatory State to the compact, besides the federal government. 18 U.S.C. app. 2 § 2, art. IV(a).

Nonetheless, the en banc First Circuit adopted the United States' view that the Supremacy Clause gives it a "one way" ticket out of that express contractual agreement with the States, App., *infra*, 11a, even

though Congress has codified that commitment in federal law. Thus, the United States, as a latecomer to this Compact—and having joined without any qualification on Article IV(a)—nonetheless insists that something in the Supremacy Clause allows the Executive Branch to override Congress's judgment and to pop in and out of adherence to the law as it sees fit, taking all the quid and avoiding all the quo of an inter-sovereign agreement.

The Supremacy Clause has never meant any such thing. And it would turn federalism principles inside out to read that Clause as licensing the Executive Branch to break Congress's word to the States, or as speaking in any way to how the overlapping operation of two federal statutes should be resolved. Forty-eight States—including Rhode Island, who joined the Compact in 1974, after the United States had already signed on in full to the Detainers Act, *see* R.I. GEN. LAWS § 13-13-1 *et seq.* (2010)—entered into the Compact on the ground that its text meant exactly what it said, and that the United States was the equal partner that Congress said it would be.

The 48 States have now been told by three circuits that the United States always has the upper hand; that Congress's codification of its promises in the United States Code is illusory; that the protections statutorily afforded to States are just an "empty shell," *see* U.S. Reh'g Pet., *supra*, at 7; and that the Constitution allows the United States' Executive Branch to pick and choose those parts of the Detainers Act with which it will and will not comply, heedless of the countervailing *statutory* rights of the States. Except, that is, in the Second Circuit, which

has adopted the opposite position from the First Circuit in enforcing the Detainers Act and its gubernatorial disallowance provision. *See United States v. Scheer*, 729 F.2d 164, 170 (2d Cir. 1984); *see also* App., *infra*, 12a, 39a-43a (majority and dissenting judges note the Second Circuit's contrary decision).

If the rules of federalism are to change that dramatically, then the States are entitled to this Court's definitive judgment on that question, so that they will have much needed certainty on the rules of contracting with the United States and will know when rights given to States under federal statutes can be unilaterally nullified by the efforts of the Executive Branch. That, at a minimum, is the type of "important [question] of federalism and comity" that warrants resolution by this Court. *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523 (1986).

## II. THE EN BANC MAJORITY WIDENED A SPLIT BETWEEN THE CIRCUITS CONCERNING A QUESTION THAT THIS COURT HAS TWICE LEFT OPEN.

In presuming that the Supremacy Clause permits the federal government to override a State's exercise of its federal statutory rights under the Detainers Act by resorting to an *ad prosequendum* writ, the First Circuit has answered (wrongly) a question twice left unresolved by this Court, and has done so in conflict with the decision of another court of appeals on the same question. The circuits' division on the rules of law governing *ad prosequendum* writs, moreover, is

rooted in their equally conflicting readings of this Court's decision in *Mauro*. Given the interests at stake, the time has come for this Court to answer that open question, to clarify *Mauro*'s meaning, and to harmonize the law for the 48 States that are party to the interstate compact codified by the Detainers Act.

1. Twice this Court has reserved the question of whether a State can decline a custody demand by the United States when made through a writ of habeas corpus *ad prosequendum*.

In *Mauro,* a case arising under the Detainers Act, this Court carefully reserved the question of whether a federal writ of habeas corpus *ad prosequendum* could be used to compel production of a State prisoner. *Mauro* held that, if the United States first triggers the Act by filing a detainer under its provisions, the subsequent use of an *ad prosequendum* writ will be deemed a "'written request for temporary custody' within the meaning of Art. IV of the Agreement." 436 U.S. at 361. "Once the Federal Government lodges a detainer against a prisoner with state prison officials, the Agreement by its express terms becomes applicable and the United States must comply with its provisions." *Id.* at 361-362. To rule otherwise, the Court concluded, "clearly would permit the United States to circumvent its obligations under the Agreement." *Id.* at 362.

In so holding, this Court was "unimpressed" by the United States' argument that treating *ad prosequendum* writs as requests for custody under the Detainers Act would violate the Supremacy

Clause because it would allow Governors, under Article IV(a), to refuse to obey such writs. *Mauro*, 436 U.S. at 363. This Court responded that Article IV(a) simply "preserve[d] previously existing rights of the sending States." *Id.* at 363; *see id.* at 363 n.28 (citing legislative history that the provision *"retained"* or *"preserved"* a "Governor's right to refuse to make the prisoner available []on public policy grounds[]").

The Court then observed that, "*[i]f* a State has never had authority to dishonor an *ad prosequendum* writ issued by a federal court, then [Article IV(a)] could not be read as providing such authority." *Mauro*, 436 U.S. at 363 (initial emphasis added). The Court did not, however, opine further on the correct answer to that "if" question. The Court thus left open, for the second time, the question of what sovereign authority, if any, the States possessed to protect their right to exclusive custody of their own prisoners. *See Carbo*, 364 U.S. at 621 n.20 (recognizing and declining to answer the question of what effect a federal *ad prosequendum* writ would have "absent [State] cooperation," in a case arising prior to the Detainers Act).[2]

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[2] This portion of the *Mauro* Court's ruling arose in deciding the consolidated case, *United States v. Ford,* No. 77-52. In the portion of the opinion dealing with defendant Mauro, the Court held that the federal government's freestanding use of an *ad prosequendum* writ did not trigger any of the Detainers Act's provisions. *Mauro*, 436 U.S. at 357-361.

2. *Mauro*'s double-negative and conditional phrasing of this unanswered question has generated substantial doctrinal confusion and contradictory rulings among the circuits both about the scope of *Mauro*'s holding and the proper resolution of its unanswered question.

The en banc majority in this case ignored *Mauro*'s conditional "if" and declared "patent" the United States' plenary authority to force a State to surrender custody of a prisoner serving a state sentence. App., *infra*, at 10a. In so ruling, the First Circuit expanded a circuit split, joining the Third and Fourth Circuits in holding that a federal *ad prosequendum* writ obtained by the United States automatically vetoes a Compact State's right to choose to retain custody of its own prisoner, the plain language of the Detainers Act notwithstanding.

In *United States v. Bryant*, the Fourth Circuit held that "an individual state *** does not have authority and is not empowered by the Act to reject a [post-detainer] federal writ of habeas corpus ad prosequendum that serves as" a written request for custody. 612 F.2d 799, 802 (4th Cir. 1979) (citing *Mauro*, 436 U.S. at 363), *cert. denied*, 446 U.S. 919 (1980). In the Fourth Circuit's view, the Detainers Act's "thirty-day period *** does not apply to federal writs of habeas corpus ad prosequendum that follow[] detainers," 612 F.3d at 802, and on that basis, the court found no error in a prisoner transfer for indictment made prior to the close of Article IV(a)'s 30-day window for a Governor's decision, *id*.

The Third Circuit likewise has rendered Article IV(a)'s provision for gubernatorial denial of a custodial transfer request irrelevant by ruling that "the Governor of Ohio had no authority to refuse the request by the United States for custody of Graham." *United States v. Graham*, 622 F.2d 57, 59 (3d Cir.), *cert. denied*, 449 U.S. 904 (1980). The Third Circuit based its ruling on what it deemed to be a "clear statement by the Supreme Court [in *Mauro*] that, in enacting Article IV(a), Congress did not intend to confer on state governors the power to disobey [post-detainer] writs issued by federal courts as 'written requests for custody' under the Act." *Id.*; *accord Trafny v. United States*, 311 F. App'x 92, 96 (10th Cir. 2009) (stating, based on *Mauro*, that Article IV "did not expand the authority of a sending state to dishonor [a post-detainer] *ad prosequendum* writ issued by a federal court," and concluding that States "never had such authority" because the Supremacy Clause subordinated the governor's right to refuse transfer to the federal habeas statute, which it viewed as the "pertinent United States law").

In contrast, the First Circuit dissent, together with the Second Circuit, read *Mauro* as holding exactly the opposite, establishing that any post-detainer *ad prosequendum* writ is deemed a "written request" under the Detainers Act, and therefore subject to all of its provisions, including Article IV(a)'s preservation of the States' historic ability to decline such a surrender of custody. In *United States v. Scheer*, 729 F.2d 164 (2d Cir. 1984), the federal government lodged a detainer with California officials, but then obtained custody over the defendant through a writ of habeas corpus *ad*

*prosequendum, id.* at 165. The defendant sought dismissal of his federal indictment because, *inter alia*, he was transferred before expiration of Article IV(a)'s 30-day window for petitioning the Governor to disapprove the transfer. *Id.* at 170. In opposition, the United States advanced the precise position endorsed by the First Circuit majority, and the Third and Fourth Circuits: Article IV(a) left the States no authority to disallow a post-detainer custody request by the United States in the form of an *ad prosequendum* writ, because the writ trumped the Detainers Act. *Id.*

The Second Circuit roundly rejected this argument. "[E]mploying [this] rationale," the Second Circuit reasoned, "would be treating the federal government's participation in the [Detainers Act] on a different footing than that of the States." *Scheer*, 729 F.2d at 170. Such disparate treatment, according to the court, would violate *Mauro*'s holding that, "once a detainer has been lodged *** it triggers the procedural rules of the Act so that the later filing of a writ of *habeas corpus ad prosequendum* is simply equivalent to a 'written request for temporary custody' and may not be used as a basis for the federal government to avoid its obligations" under Article IV. *Id.* (citing *Mauro*, 436 U.S. at 362). "[T]he historic power of the writ seems unavailing," the Second Circuit concluded, "once the government elects to file a detainer in the course of obtaining a state prisoner's presence for disposition of federal charges." *Id.*

Accordingly, had Rhode Island's immediate geographic neighbor, Connecticut, exercised its rights

under Article IV(a) of the Detainers Act, the outcome would have been the opposite of what happened here: the United States would have had to seek resolution of its custodial request in full compliance with the Detainers Act and through the channels of inter-sovereign comity that governed such matters historically, rather than through compulsion. *See, e.g.*, *McDonald v. Ciccone*, 409 F.2d 28, 30 (8th Cir. 1969) (State relinquishment of state prisoner to *ad prosequendum* writ is "a matter of comity and not of right."); *Stamphill v. Johnston*, 136 F.2d 291, 292 (9th Cir. 1943) ("There is no doubt that the state of Oklahoma *** could not be required to surrender [a prisoner] to the custody of the United States marshal for trial in the federal court[.]"). Thus only geographic lines allowed the United States in this case to pick and choose the Detainers Act provisions it wanted to comply with and cast aside those it disfavored.[3]

The Fifth Circuit, for its part, has recognized that *Mauro*'s conditional language leaves open the very question that the en banc majority and its sister circuits claim *Mauro* resolves. In *United States v. Hill*, 622 F.2d 900 (1980), that court lamented that "[t]he Supremacy Clause difficulty was circumambulated by [*Mauro*'s] utilizing conditional

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[3] After explicitly considering at length and rejecting the federal government's merits argument, the Second Circuit then denied Scheer's motion to dismiss on the alternative "ground," that Scheer had waived the right the court had just recognized for gubernatorial rejection of a federal custodial request under the Detainers Act. *Id*. at 170-171.

language," *id.* at 907 n.18. The Fifth Circuit further noted the resulting difficulties and uncertainty in the law: "Unfortunately for the states and federal prosecutors, *** [*Mauro*'s] discussion does not inform them whether governors are free to delay or deny obedience to the writ." *Id.*

Thus, the circuits are deeply divided on two issues: First, there is stark disagreement over what this Court's decision in *Mauro* says about the Detainers Act's preservation of the States' authority, under basic tenets of federalism, to retain custody of their own prisoners who are still serving duly imposed state sentences. Second, and as a result, the circuits are divided on the substantive legal question of whether Article IV(a) of the Detainers Act has any operative force when, after initiating the Detainers Act, the United States obtains a writ of habeas corpus *ad prosequendum* to nullify the custodial State's ability to exercise its federal statutory right of declination.

Both the en banc majority and the dissent acknowledged the Second Circuit's contrary conclusion. App., *infra*, 12a, 39a-40a. And the Fifth Circuit plainly reads *Mauro* as leaving open, *see Hill*, 622 F.2d at 907 n.18, the very question that the majority here deemed "patent[ly]" closed, App., *infra*, 10a.

The federal government, too, admits the conflict. In advising its own prosecutors on implementation of the Detainers Act, the United States has expressly noted the disagreement between the Third and Second Circuits as to whether a State has "the right

to disapprove a request issued in the form of a writ of habeas corpus ad prosequendum by a Federal court even when a detainer has been previously lodged."[4]

Particularly because the root source of this inter-circuit conflict in the substantive law governing the Detainers Act is lower court confusion over the meaning of *Mauro*, only this Court can bring the needed uniformity to the law and ensure that a federal statute—in particular, an interstate compact—operates consistently across State and circuit lines. After all, the whole point of an interstate compact is evenhanded treatment of all signatory States and evenhanded operation of the Compact nationally. The United States—or at least its Executive Branch—after signing on in full to this Compact, has thrown that rule of equal footing out the window, and the circuit conflict has eliminated uniformity in the Compact's and federal statute's operation. Whatever the answer, the 48 States need and are entitled to have uniform meaning restored to the Detainers Act and its codification of their Compact.

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[4] Dep't of Justice, U.S. Attorney's Manual § 534 (1997), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00534.htm.

## III. WHETHER THE DETAINERS ACT PRESERVED THE STATES' HISTORIC RIGHT TO DISALLOW A FEDERAL TRANSFER REQUEST MADE THROUGH AN *AD PROSEQUENDUM* WRIT IS AN EXCEPTIONALLY IMPORTANT QUESTION THAT MERITS THIS COURT'S REVIEW.

1. This Court's review is warranted because, at the behest of the United States, the en banc First Circuit has rendered inoperative as an unconstitutional violation of the Supremacy Clause an express provision of federal law, which is itself the product of a carefully bargained-for interstate compact. The States crafted and adopted the Interstate Agreement on Detainers as an interstate compact because of the pressing need for a cooperative, stable, and evenhanded mechanism to address, with sensitivity and mutual respect, the frequently recurring issue of multi-state demands for the custody of individuals already in the criminal detention of one State. That thousands of detainers are filed annually by criminal authorities under the Compact attests to the importance of this agreement. *See* Br. for the United States at 10 n.6, *United States v. Pleau*, No. 11-1775 (1st Cir. July 13, 2011) (reporting data).[5]

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[5] *See also* Mark Motivans, U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Justice Statistics 2009 – Statistical Tables*, Table 1.6 (Jan. 2012), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09st.pdf (BJS Table 1.6).

But like any negotiated agreement, the Compact embodies trade-offs and compromises between the interests of custodial and requesting States. The Compact is thus a product of balanced and negotiated compromise under which no one party has the upper hand. All parties give a little, but gain more. And, importantly, when Congress joined the United States to the Compact, it enacted those balanced terms and "cooperative procedures" into federal law without any limitation on the States' express Article IV(a) right to disallow a request for temporary custody. The United States thus is a full party to the Detainers Act "as both a sending and a receiving State," *Mauro*, 436 U.S. at 354, with no "distinction between the extent of the United States' participation in the Agreement and that of the other member States," *id.* at 355. Quite the opposite, Congress "enacte[d] the Agreement into law in its entirety, *** plac[ing] no qualification upon the membership of the United States." *Id.* at 356.

Tellingly, *after* the Second Circuit's decision in *Scheer*, Congress adopted two qualifications to the United States' participation, but left the United States' unreserved acceptance of Article IV(a)'s disallowance clause unmodified.[6]

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[6] *See* Detainers Act, Pub. L. No. 100–960, § 7059, 102 Stat. 4403 (1988) (codified at 18 U.S.C. app. 2 § 9) (adding "Special Provisions when United States is a Receiving State," which provide that court orders dismissing United States' indictments for failure to comply with the Agreement may be "with or without prejudice," and repealing the United States'

The United States, however, has upset that critical balance and discarded Congress's calibrated judgment by insisting—with the blessing of the en banc First Circuit majority and two circuits—that the Supremacy Clause somehow constitutionally entitles it to the benefits of the Compact without the obligations. Even when the United States chooses to proceed under the Detainers Act, the federal government insists, and the First Circuit agreed, that the United States is only bound to respect the States' interests when it chooses to. And that is so even though Congress committed the United States *in federal law* to a position of even footing, mutual compromise, and unqualified adherence to the provision at issue.

The Supremacy Clause does not give the federal government an *a la carte* option for compliance with its statutory and contractual obligations. This Court has long held that "[t]he benefit and the burden of [a government contract] clause *** must hang together." *Stone, Sand & Gravel Co. v. United States*, 234 U.S. 270, 278 (1914). Likewise, the United States may not unilaterally change the rules of the game without breaching its contractual obligations. *See, e.g.*, *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 618-619 (2000) (federal government breached contract when it changed rules for oil exploration plan approval); *United States v. Winstar Corp.*, 518 U.S. 839, 870-871 (1996) (plurality opinion) (federal government breached

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obligation to comply with the anti-shuttling rule of Article IV(e)).

contract when it repudiated promised regulatory treatment of certain assets).

In any event, whether the Executive Branch can singlehandedly upheave a negotiated interstate compact and federal statute in this manner is a profoundly important question the prompt resolution of which is critical not only to Rhode Island, but to the 47 other State signatories to the Compact. The ability of the United States to declare after the fact, whenever a State seeks to exercise its rights under the express and unqualified terms of a compact and federal statute, that those promises are "an empty shell" is of vital importance to the States not only with respect to this Compact, but also for all other state-federal contractual relationships. If the First, Third and Fourth Circuits are right, and the Second Circuit is wrong—if there is some unwritten Supremacy Clause escape hatch embedded in all such contracts with the United States no matter what Congress says—the States need to know that now.

The importance of detainers to the United States itself, moreover, cannot be overstated. The federal government seeks approximately 11,900 detainers annually. *See* BJS Table 1.6. The United States also causes nearly 2,000 *ad prosequendum* writs to be issued annually. Br. for the United States at 10 n.6., *United States v. Pleau*, No. 11-1775 (1st Cir. July 13, 2011) (reporting data and surmising that the numbers might be understated). That is why the United States itself agreed that the question presented here is of "exceptional importance" when it sought rehearing en banc in the First Circuit. *See* United States' Pet. for Panel Rehearing and

Rehearing En Banc, *supra*, at 1. The United States also confessed that the Detainers Act is of great benefit to the United States because, "[w]ithout detainers the government would have to devise a new and potentially cumbersome system for keeping track of state inmate release dates" for the thousands of state prisoners the United States seeks through the detainer system each year, and that "there would be a substantial risk that some inmates would slip through the cracks and vanish." *Id.* at 14.

But it is just as important to the States that the United States uphold its half of the bargain for those benefits it enjoys with respect to the detainers lodged under the Detainers Act, rather than claim all the benefits of the system while unilaterally absolving itself of any responsibility to respect the States' exercise of their rights under the same law. Now, with the en banc court having ruled squarely that Article IV(a)'s statutory right of gubernatorial disallowance is meaningless—indeed, constitutionally invalid under the Supremacy Clause—only this Court can restore to the Compact equal status for all signatories and evenhandedness to its operation; and only this Court can ensure that the law means what it says. That is all that Rhode Island and the 47 other signatories ask. *See* Br. of *Amici Curiae* Nat'l Governors Assoc. and Council of State Gov'ts in Support of Intervenor Lincoln D. Chafee, *supra*, at 12-14.

2. The court of appeals' decision not only rewrites the terms of a federal law codifying an interstate compact, but also casts aside settled precedent applying the *ad prosequendum* writ in a manner that

accords with principles of federalism. The weight of historic authority, in fact, squarely answers the question that *Mauro* and *Carbo* left open in favor of comity and state-federal cooperation, and in no way endorses a Supremacy Clause trump card as the First Circuit supposed. App., *infra*, 10a.

*First*, the court of appeals overlooked that the writ of habeas corpus *ad prosequendum* is one of the lesser writs of habeas corpus, and those writs have long been recognized as an efficient device to foster the effective operation of co-equal courts in the Nation's system of dual sovereignty. Such lesser writs serve not as the means to challenge the legality of detention, as the Great Writ does, but merely as devices to facilitate, consistent with principles of federalism and comity, the exercise of concurrent jurisdiction. Given their specialized role, this Court explained, when affirming the First Judiciary Act's authorization of customary writs like the *ad prosequendum* writ, that state courts are "not inferior courts" with respect to such writs. *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807). Then, and today, "States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008).

*Second*, historic precedent recognized that, in managing the challenges arising under a system of concurrent jurisdiction by dual sovereigns, "[t]he chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation

into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose." *Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922); *see also Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 370 (1872) ("Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted: and this rule applies alike in both civil and criminal cases."). While *Ponzi* involved a state court's authority to issue a writ of habeas corpus *ad prosequendum* against the federal government, its language was unequivocal: although state and federal courts "coexist in the same space, they are independent." 258 U.S. at 261. Accordingly, to allow an *ad prosequendum* writ to displace State sovereignty over execution and enforcement of their sentences would threaten a State's "administration of a discrete criminal justice system [which is one of] the basic sovereign prerogatives States retain." *Oregon v. Ice*, 555 U.S. 160, 168 (2009).

*Third*, consistent with those basic principles of constitutional federalism, courts had repeatedly held, prior to the Compact's adoption, that a State's release of a prisoner in its custody to the federal government under a federal *ad prosequendum* writ was "achieved as a matter of comity and not of right." *McDonald*, 409 F.2d at 30; *see, e.g.*, *United States ex rel. Moses v. Kipp*, 232 F.2d 147, 150 (7th Cir. 1956) (Federal district court "could not have compelled the State of Michigan to surrender Moses after he had been incarcerated in that state for violation of a Michigan

law, *** the consent of Michigan authorities was necessary to obtain the custody of Moses."); *Stamphill*, 136 F.2d at 292 ("There is no doubt that the state of Oklahoma, having first acquired jurisdiction over the appellant, was entitled to retain him in custody until he had finished his sentence and could not be required to surrender him to the custody of the United States marshal for trial in the federal court for an offense committed in violation of federal law."); *Lunsford v. Hudspeth*, 126 F.2d 653, 655 (10th Cir. 1942) (waiver of the "right [of] exclusive jurisdiction *** is a matter addressed solely to the discretion of the sovereignty"); *accord* Larry W. Yackle, *Taking Stock of Detainer Statutes,* 8 LOY. L.A. L. REV. 88, 96 (1975) ("[A] federal court cannot compel a state to give up custody of a state prisoner in order that he may be tried for a federal offense.").[7]

That States *could* dishonor the writ, moreover, is evidenced by the fact that state officials *did* occasionally decline to cooperate. *See Gordon v. United States*, 164 F.2d 855, 860 (6th Cir. 1947) (Ohio prison warden refused to produce co-defendants for trial despite issuance of a federal *ad prosequendum* writ); *United States v. Perez*, 398 F.2d 658, 660 (7th Cir. 1968) (Arkansas penitentiary warden would not comply with the federal writ).

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[7] *But see United States v. Scallion*, 548 F.2d 1168, 1173 n.7 (5th Cir. 1977) (acknowledging that *Carbo* left the question open, and disagreeing, in dicta, with cases holding that states honor the federal writ as a matter of comity), *cert. denied*, 436 U.S. 943 (1978); *Trafny v. United States*, 311 F. App'x 92, 96 (10th Cir. 2009) (States "never had *** authority" to refuse transfer when sought by *ad prosequendum* writ.).

This comity regime, under which the States as co-equal sovereigns could retain custody of their prisoners to vindicate their own criminal sentences even after a federal request was made via an *ad prosequendum* writ, is the historic practice that the Detainers Act "preserve[d]," *Mauro*, 436 U.S. at 363, but the First Circuit erased. And while "[t]he proviso of Art. IV(a) does not purport to augment the State's authority to dishonor [an *ad prosequendum*] writ," *id.*, it most certainly cannot be read, as the First Circuit majority did, to *diminish* the States' pre-enactment authority.

Judicial precedent confirming this comity regime makes sense, moreover, given the Nation's unique federalism structure. Dual sovereignty means that both the United States and the States have independent systems of criminal law and a substantial independent interest in enforcing those laws and preventing future criminal activity within their respective jurisdictions. Those cases treating inter-sovereign demands for custody of an individual as a matter of comity and cooperation between the State and federal governments properly balance *both* sovereigns' substantial interests in enforcing their criminal laws. The First Circuit, by contrast, put all the weight on the federal side of the scale. That is how the court concluded that a federal writ is all that is needed to seize a state prisoner who is serving a state sentence out of state custody and to vitiate that State's right to enforce and vindicate its own criminal judgment. There is no balance in a system like that.

3. The First Circuit traded in that half century of precedent respecting federalism for a Supremacy

Clause phantasm. Petitioner in this case enforced a right afforded the State under the plain and unqualified text of a *federal statute* that *Congress* made binding on the United States. Whether that more specific federal statutory directive should control over the general provisions of the federal habeas corpus statute is a question about which the Supremacy Clause says nothing.

Likewise, the Supremacy Clause does not relieve the federal government from its contractual commitments. The "'United States are as much bound by their contracts as are individuals.'" *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189 (2012) (quoting *Lynch v. United States*, 292 U.S. 571, 580 (1934)); *see Sinking Fund Cases*, 99 U.S. 700, 719 (1878) (same). The authority of the federal government to enter into binding agreements not only does not derogate federal sovereignty, but is "'the essence of sovereignty' itself." *Winstar*, 518 U.S. at 884 (quoting *United States v. Bekins*, 304 U.S. 27, 51-52 (1938)). When the federal government obligates itself by contract, it "yield[s] [its] freedom of action in particular matters in order to gain the benefits which accrue." *Bekins*, 304 U.S. at 52. In so doing, it must take the bitter with the sweet.

Finally, holding the federal government to its word "furthers 'the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies.'" *Ramah Navajo Chapter*, 132 S. Ct. at 2190 (quoting *Winstar*, 518 U.S. at 883). In dealing with co-equal sovereigns, it is all the more important that the United States act reliably. Interstate compacts are

important tools of cooperative federalism, necessary for the management of complex problems that arise in a system of dual sovereignty. Such cooperative agreements serve as "the legislative means" of "adapting to our Union of sovereign States the ageold treaty-making power of independent sovereign nations." *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 279 n.5 (1959).

In making the considered decision to join the United States as a coequal party to the Compact, and having formalized this agreement through passage of the Detainers Act, Congress has plainly recognized the longstanding authority of the States in this sphere and obligated the United States to adhere to the Compact when it invokes its procedures. Because federal law thus binds the federal prosecutors' hands, the Supremacy Clause offers no release and, indeed, "it clearly would permit the United States to circumvent its obligations under the Agreement" for the federal government to be able to reap the compact's rewards, but disregard its obligations. *Mauro*, 436 U.S. at 362.

If left standing, the ruling below would condone the federal government's contravention of the express terms of the Detainers Act, putting at risk not only the continued viability of a recognized and cost-effective system for governing prisoner transfers between state and federal jurisdictions, but also threatening States' willingness, going forward, to contract as peers with the federal government. The implications are far-reaching, jeopardizing not only other federal-state compacts, but also the exercise of Congress's power under the Spending Clause. *See*

*National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J, joined by Breyer and Kagan, JJ.) ("Spending Clause legislation [is] much in the nature of a *contract*."). When the federal government knowingly and voluntarily contracts with the States as co-equals and Congress codifies that commitment in federal law, requiring the Executive Branch to keep its word both respects principles of constitutional federalism and fully comports with the Supremacy Clause.

## CONCLUSION

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

Respectfully submitted.

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August 21, 2012

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI**

TABLE OF CONTENTS

**United States Court of Appeals**
**For the First Circuit**

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No. 11–1775

UNITED STATES OF AMERICA,

Appellee,

v.

JASON W. PLEAU

Defendant, Appellant.

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LINCOLN D. CHAFEE, in his capacity as Governor of the State of Rhode Island,

Intervenor.

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No. 11–1782

IN RE JASON WAYNE PLEAU,

Petitioner.

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LINCOLN D. CHAFEE, in his capacity as Governor of the State of Rhode Island,

Intervenor.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND and PETITION FOR A WRIT OF PROHIBITION

[Hon. William E. Smith, U.S. District Judge]

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Before
Lynch, Chief Judge,
Torruella, Boudin, Howard and Thompson, Circuit Judges.

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Claire Richards, Executive Counsel, for intervenor.

William F. Cavanaugh, Daniel Ruzumna, Joshua A. Goldberg, Jason S. Gould, Muhammad U. Faridi, Christopher M. Strong, Catherine E. Geddes and Patterson Belknap Webb & Tyler LLP on brief for National Governors Association and Council of State Governments, Amici Curiae.

Matthew L. Fabisch on brief for the Stephen Hopkins Center for Civil Liberties, Amicus Curiae.

Robert B. Mann, by appointment of the court, with whom Mann & Mitchell, David P. Hoose, by appointment of the court, and Sassoon, Turnbull & Hoose, were on supplemental brief for petitioner.

Anthony D. Mirenda, Daniel N. Marx, Jennifer S. Behr, Eric A. Haskell, Foley Hoag LLP, Carolyn A. Mannis, Rhode Island ACLU, Zachary L. Heiden, ACLU of Maine, Barbara A. Keshen, New Hampshire Civil Liberties Union, Joshua L. Dratel, National Association of Criminal Defense Lawyers, Juan F. Matos de Juan, Colegio de Abogados de Puerto Rico, William Ramirez, ACLU of Puerto Rico, John Reinstein, ACLU of Massachusetts, Judith H. Mizner, Office of the Federal Defender, Prof. Andres Horwitz, Rhode Island Association of Criminal Defense Lawyers, on brief for Rhode Island ACLU; ACLU of Puerto Rico; ACLU of Maine; ACLU of Massachusetts; New Hampshire Civil Liberties Union; Office of the Federal Defender for the Districts of Rhode Island, Massachusetts and New Hampshire; National Association of Criminal Defense Lawyers; Rhode Island Association of Criminal Defense Lawyers; and Colegio de Abogados de Puerto Rico, Amici Curiae.

Donald C. Lockhart, Assistant United States Attorney, with whom Peter F. Neronha, United States Attorney, was on brief for appellee.

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May 7, 2012

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OPINION EN BANC

**BOUDIN, Circuit Judge**. A federal grand jury indicted Jason Pleau on December 14, 2010, for

crimes related to the September 20, 2010, robbery and murder of a gas station manager making a bank deposit in Woonsocket, Rhode Island. 18 U.S.C. §§ 2, 1951(a) (robbery affecting commerce); id. § 1951(a) (conspiring to do the same); id. § 924(c)(1)(A), (j)(1) (use of a firearm during and in relation to a crime of violence resulting in death). The federal prosecutor could seek the death penalty but that decision depends on U.S. Attorney General approval after a lengthy process. See, e.g., United States v. Lopez–Matias, 522 F.3d 150, 155 (1st Cir. 2008).

Pleau was in Rhode Island state custody on parole violation charges when the federal indictment came down, and is now serving an 18–year sentence there for parole and probation violations. To secure Pleau's presence in federal court, the federal government invoked the Interstate Agreement on Detainers Act ("IAD"), Pub. L. No. 91–538, 84 Stat. 1397 (1970) (codified as amended at 18 U.S.C. app. 2 § 2). The IAD provides what is supposed to be an efficient shortcut to achieve extradition of a state prisoner to stand trial in another state or, in the event of a federal request, to make unnecessary the prior custom of a federal habeas action. See IAD art. I.

In this instance, Rhode Island's governor refused the IAD request because of his stated opposition to capital punishment. United States v. Pleau, No. 10–184–1S, 2011 WL 2605301, at *2 n.1 (D.R.I. June 30, 2011). The federal government then sought a writ of habeas corpus ad prosequendum from the district court to secure custody of Pleau--this being the traditional method by which a federal

court obtained custody. E.g., Carbo v. United States, 364 U.S. 611, 615–16, 618 (1961). Codifying common law practice, the statute authorizing the writ empowers a federal court to secure a person, including one held in state custody, where "necessary to bring him into [federal] court to testify or for trial." 28 U.S.C. § 2241(c)(5).

Pursuant to the habeas statute, the federal district court in Rhode Island ordered Pleau to be delivered into federal custody to answer the federal indictment. Pleau, 2011 WL 2605301, at *4. Pleau both appealed and, in the alternative, petitioned this court for a writ of prohibition to bar the district court from enforcing the habeas writ. A duty panel of this court, over a dissent, stayed the habeas writ, and an expedited appeal followed in which the Rhode Island governor was granted belated intervention. Ultimately, the same panel, again over a dissent, held in favor of Pleau and the governor.

On petition of the federal government, the full court granted rehearing en banc; the en banc court vacated the panel decision but left the stay in effect until resolution of the en banc proceeding. We consider first the propriety of review of the district court's grant of the writ given that the federal criminal case against Pleau remains pending. Piecemeal appellate review of trial court decisions is--with few, narrowly interpreted exceptions--not permitted, especially in criminal cases. United States v. Kane, 955 F.2d 110, 110–11 (1st Cir. 1992) (per curiam).

Nevertheless, we need not wander into the

thicket of Pleau's own debatable standing to appeal from a writ merely commanding his presence to answer criminal charges,[1] nor explore the possible use of the "collateral order" doctrine to rescue the interlocutory appeal. Governor Chafee, in an order not disturbed by the grant of the en banc rehearing petition, was allowed to intervene. And as a party to the case, he is entitled to argue for an advisory writ of prohibition, which suffices to bring the merits of the dispute to us for resolution.

While writs of mandamus and prohibition--two sides of the same coin with interchangeable standards, United States v. Horn, 29 F.3d 754, 769 n.18 (1st Cir. 1994)--are generally limited to instances of palpable error threatening irreparable harm, e.g., In re Pearson, 990 F.2d 653, 656 & n.4 (1st Cir. 1993), "advisory mandamus" is available in rare cases; the usual requisites are that the issue be an unsettled one of substantial public importance, that it be likely to recur, and that deferral of review would potentially impair the opportunity for effective review or relief later on. Horn, 29 F.3d at 769–70.

A state's refusal to honor a federal court writ is surely a matter of importance; and, if they could, states would certainly mount more such challenges.

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[1] E.g., Weekes v. Fleming, 301 F.3d 1175, 1180 n.4 (10th Cir. 2002), cert. denied, 537 U.S. 1146 (2003); Weathers v. Henderson, 480 F.2d 559, 559–60 (5th Cir. 1973) (per curiam); Derengowski v. U.S. Marshal, Minneapolis Office, Minn. Div., 377 F.2d 223, 223–24 (8th Cir.), cert. denied, 389 U.S. 884 (1967); United States v. Horton, No. 95–5880, 1997 WL 76063, at *3 (4th Cir. Feb. 24, 1997) (per curiam) (unpublished).

Whether Pleau would be prejudiced if review now were refused is less clear; but the governor could hardly obtain meaningful relief following a federal conviction of Pleau. And neither the federal government nor the other parties dispute that the issue can be considered on advisory mandamus. So we turn to the merits, which present two interrelated but sequential questions.

The first is whether the IAD statute precludes the federal government's use of the habeas writ, after a detainer has been filed and an initial IAD request has been rejected, to convert a request into a command. The second question is whether in such a case the habeas statute compels the state governor to deliver the prisoner or whether compliance is merely a matter of comity that the governor may withhold. This is the way the Supreme Court structured the issues in United States v. Mauro, 436 U.S. 340 (1978), which resolves the first question and frames the second in a way that clearly dictates the answer.

Of two different federal appeals disposed of by Mauro, only one is directly pertinent to Pleau. The federal government invoked the IAD by lodging a detainer with state prison authorities so that the defendant charged with federal crimes would not be released without notice; and the prosecutor then summoned the defendant from state prison by habeas writ, first for arraignment and (after many postponements) then for trial. The defendant objected that he was being denied the speedy process required by Article IV(c) of the IAD. 436 U.S. at 345–48.

After the defendant's federal conviction, the circuit court held that the deadlines prescribed by the IAD had been breached, requiring (under explicit provisions of the IAD) dismissal of the federal indictment with prejudice. The Supreme Court agreed, saying that the detainer had triggered the IAD and that the habeas writ comprised a "written request" for initiating a transfer contemplated by Article IV of the IAD. Mauro, 436 U.S. at 361–64. That the writ had been used as part of the IAD process did not negate the IAD's express time limitations and sanction for ignoring them. Id.

However, Mauro went on to reject the suggestion that, if the Court upheld the time limit on the IAD proceeding, a state governor could in some other case frustrate a writ of habeas corpus by refusing to surrender a prisoner to federal court. Instead, the Court distinguished between the time limits of Article IV(c) triggered by the detainer and Article IV(a)'s reservation of the governor's power to withhold consent. Mauro, 436 U.S. at 363–64. The time limits, it said, had been accepted by the federal government when it invoked the IAD procedures. Id. at 364.

By contrast, the Court held, the consent reservation merely preserved for holding states any pre-existing authority they had to refuse requests, Mauro, 436 U.S. at 363 & n.28; it did not curtail whatever authority the habeas writ traditionally gave the federal court to insist on the production of a defendant contrary to the wishes of the state. The Court responded to the federal government's concern that a decision in favor of Mauro would allow a

governor to refuse a habeas writ:

> We are unimpressed. The proviso of Art. IV(a) does not purport to augment the State's authority to dishonor such a writ. As the history of the provision makes clear, it was meant to do no more than preserve previously existing rights of the sending States, not to expand them. If a State has never had authority to dishonor an ad prosequendum writ issued by a federal court, then this provision could not be read as providing such authority.

Id. at 363 (internal footnote omitted and emphasis added).

This limiting passage was part of the Court's balanced reading of the IAD and, in answering a substantive objection to the Court's treatment of the IAD's time limits as binding on the federal government, was not dicta but part of the Court's rationale for its holding. And in saying that state authority to withhold the prisoner was not augmented beyond whatever had existed before the IAD, Mauro was saying that a habeas writ--even though it followed a detainer--retained its pre-IAD authority to compel a state to surrender a prisoner.

That Article IV(a)'s proviso was not intended to give governors a veto power operative against the federal government is borne out by a telling piece of background indicating that it was concerned with the pre-IAD rules of extradition as between individual

states;[2] the federal government, by contrast, proceeded prior to the IAD not by extradition but by use of habeas. But the proper construction of Article IV(a) is not open to debate here: under Mauro, its proviso cannot be read as "providing . . . authority" that the states had previously lacked. 436 U.S. at 363.

That "a state has never had authority to dishonor an ad prosequendum writ issued by a federal court" is patent. Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the habeas statute--like any other valid federal measure--overrides any contrary position or preference of the state, a principle regularly and famously reaffirmed in civil rights cases, e.g., Cooper v. Aaron, 358 U.S. 1, 18–19 (1958); United States v. Barnett, 376 U.S. 681 (1964), as in many other contexts, e.g., Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695–96 (1979). State interposition to defeat federal authority vanished with the Civil War.

Pleau and Governor Chafee cite a miscellany of old circuit-court statements that a demand by a federal court for a state prisoner depends upon

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[2] The report of the Council of State Governments, which drafted the IAD and urged its adoption on the states and federal government, Mauro, 436 U.S. at 350–51, explained: "The possibility [of the Governor withholding consent] is left open merely to accommodate situations involving public policy which occasionally have been found in the history of extradition." Council of State Gov'ts, Suggested State Legislation Program for 1957, at 79 (1956) (emphasis added).

comity,[3] but these cases misread a 1922 Supreme Court case, Ponzi v. Fessenden, 258 U.S. 254, 260–62 (1922); Ponzi, referring generally to principles of comity, held that the federal government through the Attorney General could choose, as a matter of comity on its side, to deliver a federal prisoner for trial on state charges. Id. at 262. Ponzi neither held nor said that a state governor may invoke comity principles to disobey a federal court habeas writ.

None of these circuit cases cited by Pleau and the governor presented a litigated controversy between the United States and a state over the enforcement of a federal writ. To the extent not dicta or brief asides, such cases involved odd situations such as attempts by federal criminal defendants to obtain the presence of co-defendants held in state prisons. In all events, these cases cite Ponzi (or other circuit cases relying on Ponzi), which simply had nothing to do with a federal court's order to a state.

The Supremacy Clause operates in only one direction and has nothing to do with comity: it provides that Congress' [sic] enactments are "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. That there is an overriding federal interest in prosecuting defendants indicted on federal crimes needs no

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[3] See, e.g., McDonald v. Ciccone, 409 F.2d 28, 30 (8th Cir. 1969); Stamphill v. Johnston, 136 F.2d 291, 292 (9th Cir.), cert. denied, 320 U.S. 766 (1943); Lunsford v. Hudspeth, 126 F.2d 653, 655 (10th Cir. 1942).

citation, and the habeas statute is an unqualified authorization for a federal court to insist that a defendant held elsewhere be produced for proceedings in a federal court.

This court earlier said that we were "confident that the writ would be held enforcible" over a state's contrary preference. United States v. Kenaan, 557 F.2d 912, 916 n.8 (1st Cir. 1977); accord United States v. Graham, 622 F.2d 57, 59 (3d Cir.), cert. denied, 449 U.S. 904 (1980); United States v. Bryant, 612 F.2d 799, 802 (4th Cir. 1979), cert. denied, 446 U.S. 919 (1980); Tranfy v. United States, 311 F. App'x 92, 95–96 (10th Cir. 2009) (unpublished).[4] A contrary Second Circuit dictum, United States v. Scheer, 729 F.2d 164, 170 (2d Cir. 1984), was properly described as a misreading of Mauro. See id. at 172 (Kearse, J., concurring).

As a fallback, Pleau and Governor Chafee say that even if today courts would all agree that the Supremacy Clause trumps a state's refusal to honor the writ, Congress--to borrow a phrase--"captured in amber" the misguided notion from old (but erroneous) circuit precedent that honoring the federal writ is a matter of state comity. There is, of course, nothing to suggest that Congress was remotely aware of these decisions; and, as already noted (see note 2, above),

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[4] Yet another circuit, while noting that Mauro's conditional language left the ultimate issue open, observed: "We would have thought that, under the Supremacy Clause, a state was not free to delay or disapprove compliance with the writ executed under federal statutory authority . . . ." United States v. Hill, 622 F.2d 900, 907 & n.18 (5th Cir. 1980).

what legislative history exists shows that the consent provision was concerned with one state's effort to extradite a prisoner held by another and the possible need for consent.

Even without such history, the construction offered fails the test of common sense. One can hardly imagine Congress, whether in approving the IAD or at any other time, empowering a state governor to veto a federal court habeas writ--designed to bring a federally indicted prisoner to federal court for trial on federal charges--because the governor opposed the federal penalty that might be imposed if a conviction followed. If we were now determining Congress' [sic] intent afresh, the improbability of such an intention would be apparent.

But, once again, this court cannot disregard Mauro and and [sic] construe the consent provision as if it were an open issue; canons of construction, interpretive rules for compacts, and conjectures about whether Congress held mistaken views at the time of the IAD's adoption are all beside the point. Mauro said that "[i]f a State has never had authority to dishonor an ad prosequendum writ issued by a federal court, then [the consent provision] could not be read as providing such authority." 436 U.S. at 363. Given the Supremacy Clause, the states have always lacked that authority.

Were Pleau and Governor Chafee to prevail, Pleau could be permanently immune from federal prosecution, and the use of the efficient detainer system badly compromised. He is currently serving an 18–year term in Rhode Island prison and, if the

writ were denied, might agree to a state sentence of life in Rhode Island for the robbery and murder.[5] Even if Pleau served only his current 18–year term, needed witnesses for federal prosecution could be unavailable two decades from now. Instead of a place of confinement, the state prison would become a refuge against federal charges. Mauro forbids such a result.

The writ of prohibition is denied and the stay of the habeas writ is vacated.

It is so ordered.

**—Dissenting Opinion Follows—**

**TORRUELLA, Circuit Judge, with whom THOMPSON, Circuit Judge, joins, dissenting**. I am compelled to dissent because in reaching its announced result, the majority fails to follow the express terms of the Interstate Agreement on Detainers Act,[6] snubs the rules applicable to the enforcement of interstate compacts as reiterated most recently by the Supreme Court,[7] and compounds these errors by misconstruing the holding in United States v. Mauro, 436 U.S. 340 (1978). As the Supreme Court has stated multiple times, federal

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[5] See Brief for Amicus Curiae Governor Lincoln D. Chafee in Support of Pet'r Ex. A (letter from Pleau to Rhode Island Assistant Attorney General offering to plead to sentence of life without parole on state charges).

[6] Pub. L. No. 91–538, 84 Stat. 1397 (1970) (codified as amended at 18 U.S.C. app. 2 § 2).

[7] Alabama v. North Carolina, 130 S. Ct. 2295 (2010).

courts should not "'order relief inconsistent with [the] express terms' of a compact, 'no matter what the equities of the circumstances might otherwise invite.'" Alabama v. North Carolina, 130 S. Ct. 2295, 2313 (2010) (quoting New Jersey v. New York, 523 U.S. 767, 811 (1998)). Yet with its ruling, the majority has done exactly what the Supreme Court said courts must not do: it has ordered relief plainly inconsistent with the express terms of the Interstate Agreement on Detainers ("IAD" or "Agreement") based on its own misguided view of the equities of the circumstances of this case.

There is no dispute that the United States is a party to the IAD. Furthermore, the IAD's plain language and history make clear that the United States is bound by all of its provisions. One of those provisions, Article IV(a), provides that a State may request custody over a prisoner from another State by sending a "written request for temporary custody or availability"; however, Article IV(a) also gives the Governor of the State from which custody is requested the right to refuse such a request. Under the Supreme Court's holding in Mauro, once the United States (or any other State) invokes the IAD by lodging a detainer against a prisoner, any subsequently-filed writ of habeas corpus ad prosequendum is treated as a "written request for temporary custody and availability" under the IAD. See 436 U.S. at 351–52.

Applying the aforementioned principles to the facts of this case, the proper result is clear. The United States invoked the IAD when it lodged a detainer against Jason Wayne Pleau ("Pleau").

Because the United States invoked the IAD, the writ of habeas corpus ad prosequendum granted by the district court must, under Mauro, be treated as a request for custody under the IAD. Therefore, the Governor of Rhode Island had the right under the IAD to refuse the request. The majority avoids this result only by manufacturing a Supremacy Clause issue where none exists and by misinterpreting Mauro.

## I.

There is no question that the IAD is an interstate compact[8] among the United States and 48 other States. "[E]ven the Government concedes[ ]

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[8] As such it was enacted pursuant to the Compact Clause. U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State . . . ."). Congress originally granted its consent for various States to enter into the IAD by enacting the Crime Control Act of 1934, 48 Stat. 909. See Cuyver v. Adams, 449 U.S. 433, 441 (1981). In 1970, Congress caused the District of Columbia and the United States itself to join the IAD by enacting the Interstate Agreement on Detainers Act. See Mauro, 436 U.S. at 343. The congressional approval of this interstate compact transformed the compact into federal law. Cuyver, 449 U.S. at 438. An interstate compact that requires congressional approval, such as the IAD, needs this approval because consent by the United States must be given before there can be an "encroach[ment] or interfer[ence] with the just supremacy of the United States." Id. at 440 (citations omitted). There should thus be no question that in entering into the IAD as an equal "State," Mauro, 436 U.S. at 354, the United States was, for purposes of the subject matter of the IAD, relinquishing any superior sovereign rights that may have preexisted the Agreement.

[that] the Agreement as enacted by Congress expressly includes the United States within the definition of 'State.'" Mauro, 436 U.S. at 354. As further stated in Mauro, "[t]he [IAD] statute itself gives no indication that the United States is to be exempted from the category of receiving States. To the contrary, [Article] VII states that 'this agreement shall enter into full force and effect as to a party State when such State has enacted the same into law.'" Id. at 354 (alterations omitted). "[T]here is no indication whatsoever that the participation of the United States was to be a limited one." Id. at 355.

The consequence of Congress's deliberate adoption of the IAD is that "the United States is bound by the Agreement when it activates its provisions by filing a detainer against a state prisoner and then obtains his custody by means of a writ of habeas corpus ad prosequendum." Id. at 349. In the present case, the United States activated the provisions of the IAD -- and thus bound itself to the IAD's terms -- by lodging a detainer against Pleau, who at the time was serving an 18–year prison sentence in the custody of the State of Rhode Island for parole violations. The detainer filed by the United States was related to a federal indictment issued for alleged federal crimes involving the same acts that were the subject of state-law charges pending in Rhode Island at the time.[9]

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[9] Pleau is presently serving an 18 year sentence of imprisonment for parole and probation violations in Rhode Island. He agreed to plead guilty to the state crimes for which he was charged and to accept a sentence of life imprisonment

After lodging the detainer, the United States sent a request for custody to Rhode Island. The Governor of Rhode Island, Lincoln Chafee ("Governor Chafee" or the "Governor"), invoking his authority under Article IV(a) of the IAD, refused to surrender Pleau to the federal authorities. Governor Chafee cited state public policy grounds for his rejection, namely Rhode Island's longstanding opposition to the death penalty as an appropriate punishment, a penalty to which Pleau would be exposed if convicted on federal charges.

Undeterred by the Governor Chafee's refusal, the United States then proceeded to attempt an end run around its commitments under the IAD by seeking the production of Pleau pursuant to a writ of habeas corpus ad prosequendum. The district court granted the writ, but a duty panel of this court (with one dissent) stayed its execution pending Pleau's appeal, and Governor Chafee later intervened. The same panel (again with one dissent), pursuant to advisory mandamus, issued a writ of prohibition enforcing Governor Chafee's right to refuse to transfer Pleau. See United States v. Pleau, 662 F.3d 1 (1st Cir. 2011).

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without the possibility of parole. See Br. for Amicus Curiae Governor Lincoln S. Chafee in Support of Pet'r, Ex. A (letter from Pleau to Rhode Island Assistant Attorney General offering to plead to sentence of life without parole on state charges). After Pleau agreed to the plea and sentence, but before the United States first requested custody of Pleau, the Rhode Island Attorney General dismissed the charges against Pleau without prejudice. See Katie Mulvaney, Faceoff Looms Over Suspect; Courts, Providence Journal, June 28, 2011, at 1.

The panel noted Mauro's holding that "'once a detainer has been lodged' . . . 'it clearly would permit the United States to circumvent its obligations under the [IAD] to hold that an ad prosequendum writ may not be considered a written request for temporary custody.'" Pleau, 662 F.3d at 10 (quoting Mauro, 436 U.S. at 362). Based on this clear statement from Mauro, the panel held that

> once the federal government has elected to seek custody of a state prisoner under the IAD, it is bound by that decision. Any subsequent ad prosequendum writ is to be considered a written request for temporary custody under the IAD and, as such, subject to all of the strictures of the IAD, including the governor's right of refusal.

Pleau, 662 F.3d at 12.

As alluded to, the en banc majority rejects this outcome, denies the writ of prohibition, and vacates the stay of the execution of the habeas writ. The substance[10] of the majority's opinion is, first of all, that Mauro "reject[ed] the suggestion that, if the Court upheld the time limit on the IAD proceeding [under Article IV(c) ], a state could in some other case frustrate a writ of habeas corpus by refusing to surrender a prisoner to federal court." Maj. Op. at 7.

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[10] For present purposes I deem it unnecessary to discuss the preliminary and procedural matters referred to in the first five pages of the majority's opinion.

According to the majority's opinion, the Court "merely preserved for the holding states any pre-existing authority they had to refuse requests." Id. at 8. The majority next contends that it "is patent" that Rhode Island lacks authority "to dishonor an ad prosequendum writ issued by a federal court . . . [by virtue of] the Supremacy Clause, U.S. Const. art. VI, cl. 2." Id. at 9.[11] The majority then posits a catch-all ratiocination, pursuant to which it concludes that Rhode Island's arguments "fail[ ] the test of common sense," id. at 11. Lastly, as a sequel to this argument, it proceeds to adopt the Government's scenario of inevitable horribles which allegedly will follow if the United States is made to comply with what it agreed to as a signatory State under the IAD. Id. at 13.

With respect, I find all of these arguments flawed.

## II.

We first turn to the Supremacy Clause argument, the recurrent "Big Brother" argument that is used by the federal government when it attempts to push its weight against the States. In this case it

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[11] The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

is only one of several smoke screens behind which the majority attempts to shield the weakness of the Government's position, and it is the most baseless of all the reasons given for overturning the panel opinion.

The majority states that "[u]nder the Supremacy Clause . . . the habeas statute -- like any other valid federal measure -- overrides any contrary position or preference of the state . . . ." Maj. Op. at 9. However, this statement is a red herring. Again, as recently stated by the Supreme Court in Alabama v. North Carolina, "an interstate compact is not just a contract; it is a federal statute enacted by Congress." 130 S. Ct. at 2312 (emphasis added). See also n.3, ante. Thus, the issue presented is not, as framed by the majority, one of conflict between a federal law and Rhode Island's contrary position or preference. Rather, because the IAD is a federal statute, just like the habeas statute is a federal statute, the issue here is how two federal statutes interact, a determination in which the Supremacy Clause plays no part. That question is answered by reading both federal laws and by determining, in the first place, whether there is any conflict that arises from reading the plain language of each statute. As will be presently discussed, there is nothing in the habeas corpus statute as presently articulated, or any of its predecessors going back to the Judiciary Act, that supercedes, contravenes, or downgrades the provisions of the IAD vis-a-vis the habeas corpus

legislation.[12]

The federal habeas corpus writ was first authorized to be issued by federal courts pursuant to Section 14 of the Judiciary Act of 1789.[13] Since then habeas corpus practice has been formalized into a singular federal statute, 28 U.S.C. § 2241 et seq., which law has been amended on various occasions over the years, the last major amendment taking place in 1996 as part of the Anti–Terrorism and Effective Death Penalty Act.[14] A perusal of these federal acts, including through the present rendition of the statute, reveals no text which would allow one to conclude that the federal habeas corpus statute

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[12] For this reason, the cases the majority refers to in which the Supremacy Clause was invoked to enforce treaties or Federal civil rights laws in the face of non-compliance by States are completely inapposite. See Maj. Op. at 8–9. This is not a case involving "State interposition to defeat federal authority." Id. at 9. This is a case in which a State governor exercised a right expressly given to him by federal law. As noted in the panel majority opinion, "the federal government may 'waive the federal sovereign's strict right to exclusive custody of a prisoner' in favor of state custody." Pleau, 662 F.3d at 13 n.9 (quoting Poland v. Stewart, 117 F.3d 1094, 1098 (9th Cir. 1997)). This is precisely what the United States did by joining the IAD and invoking it in Pleau's case. The Supremacy Clause is not even implicated, much less violated, when the United States voluntarily waives its right to custody in favor of a State.

[13] See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (1789) ("And be it further enacted, That all the before mentioned courts of the United States, shall have power to issue writs of . . . habeas corpus . . . .").

[14] See Pub. L. 104–132 (1996). For a concise history of the writ throughout its history since the Judiciary Act up to 1996, see Carbo v. United States, 364 U.S. 611, 614–619 (1961).

trumps any other federal statute, particularly one enacted for specific application to specific circumstances such as the IAD.

Although not directly relevant to the case before us, I believe it is worth pointing out that the amendments to § 2254 enacted by Congress in 1996, which deal in part with the issuance of habeas corpus writs by federal courts involving state prisoners, considerably restricted the power of federal courts to act.[15] This action clearly reflects Congress's concern[16] with the issues raised by the dual sovereignty that is the basis of our form of government. See Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751–52 (2002) ("Dual sovereignty is a defining feature of our Nation's constitutional blueprint . . . ."). Even in cases where

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[15] Among the restrictions placed on the power of federal courts to issue writs involving persons in state custody, the writ is not to issue unless the state court proceedings "(1) resulted in a decision that was contrary to, or involved, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254.

[16] See, e.g., Lindh v. Murphy, 96 F.3d 856, 873 (7th Cir. 1996) (Easterbrook, J.) (noting that with AEDPA "[Congress intended] to move back in [the] direction" of limiting federal court habeas review); Erwin Chemerinsky, Reconceptualizing Federalism, 50 N.Y. L. Sch. L. Rev. 729, 731 (2005–2006) (citing to AEDPA as one of a number of recent shifts towards States' rights). Cf. Wood v. Milyard, -- U.S. --, No. 10–9995 (decided Apr. 24, 2012) (upholding authority of State to waive statute of limitations defense under AEDPA, and holding that "it is an abuse of discretion" by a Court of Appeals "to override a State's deliberate waiver of a limitations defense").

the supremacy of federal legislation over a state law is an issue, a situation which is clearly not in the case before us, application of this principle requires a light touch, not the overbearingness[17] of a sledge hammer.[18]

Finding no specific language in any past or present configurations of the habeas statute that informs us as to the issues before us, we turn to the second, and central, federal statute that concerns us, the IAD. This is a federal statute that deals with a specific issue: the attainment by one sovereign State

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[17] The majority opinion interjects a modicum of unnecessary federal arrogance, one which unfortunately permeates this entire controversy, when it states that "[t]he Supremacy Clause operates only in one direction." Maj. Op. at 11.

[18] We further digress to interject that the crimes Pleau is alleged to have committed -- armed robbery and murder of a private citizen on the way to making a deposit in the bank -- are quintessential state crimes, and betray on their face no hint of any uniquely federal interest. See United States v. Jiménez–Torres, 435 F.3d 3, 13–15 (1st Cir. 2006) (Torruella, J., concurring) (objecting to the unwarranted extension of federal criminal jurisdiction over traditionally state crimes). In the present case, extending federal jurisdiction over a crime with at most, de minimis impact on interstate commerce, is stretching that concept beyond the bounds of Congress's constitutional power. Cf. United States v. Lopez, 514 U.S. 549 (1995). Moreover, given that Pleau has already agreed to plead guilty to state crimes and to a life sentence without possibility of parole, it is frankly unclear what it is that the federal government hopes to gain by its overkill. This is particularly manifest in light of the truly extraordinary costs that will have to be invested by the federal government if it continues to pursue this capital litigation, something that in these times of economic restraint seems unduly wasteful of limited resources.

of the body of a person in the custody or control of another sovereign State. We are not disappointed in our search, for we find relevant language within the four corners of this federal statute regarding what happens when these issues come into play. The pertinent part of this legislation, Article IV(a) of the IAD specifically states:

> [U]pon presentation of a written request for temporary custody . . . to the appropriate authorities of the State in which the prisoner is incarcerated . . . there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.[19]

We need go no further, for there is nothing equivocal in this language nor is there anything else in this federal statute which contravenes or dilutes the discretion that Congress has granted to a State Governor pursuant to this interstate agreement, one which the United States joined as a co-equal "State."[20] See Mauro, 436 U.S. at 354.

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[19] 18 U.S.C. app. § 2 (2012).

[20] A comprehensive view of the IAD confirms that the United States is a coequal State for purposes of Article IV(a). Congress amended the IAD after Mauro to add specific

The United States became unequivocally bound by all of the provisions of the IAD upon its filing of a detainer against Pleau with the Rhode Island authorities. See id. at 349. These provisions include a grant, by the United States to the other signatory States, of the right to refuse a request for custody. There is nothing in the express language of the IAD, or its legislative history, to indicate that the grant of rights agreed to by the United States with Congress' [sic] approval, id. at 353–55, is trumped in any way by other federal statutes, including the habeas corpus statute. Thus, we proceed to discuss the majority's interpretation of the Supreme Court's holding in Mauro, an interpretation which inevitably leads them to their erroneous conclusions.

**III.**

As is true with most cases, Mauro cannot be

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exceptions treating the United States differently from other parties with respect to some parts of the IAD, but not article IV(a). See Pub. L. No. 100–960, Title VII, § 7059, 102 Stat. 4403 (1988) (codified at 18 U.S.C. app. 2 § 9). For example, Section 9 of the IAD, "Special Provisions When the United States is a Receiving State," states that a dismissal of "any indictment, information or complaint may be with or without prejudice" when the United States is a receiving state. 18 U.S.C. app. 2 § 9(1). In contrast, when any other party to the IAD is a receiving State, such a dismissal "shall" be with prejudice. Id. § IV(e). Section 9 does not indicate that the United States can disregard or override a sending State's denial of its request for temporary custody. And aside from Section 9's enumerated exceptions, Congress has stuck with the IAD's definition of the United States as a "State" on the same footing as other receiving states. See Mauro, 436 U.S. at 354; see also 18 U .S.C. app. 2 § 2 art. II.

read by isolating those parts that may conveniently support a predestined point of view. Properly considered, a case needs to be read and analyzed in all its parts and in a coordinated fashion. Unfortunately, this the majority fails to do.

In Mauro, the Supreme Court had before it two related cases, both of which have relevance to the present appeal because they establish "the scope of the United States' obligations under the [IAD]." Id. at 344. In the first of these cases, Case No. 76–1596, the question presented was whether a writ of habeas corpus ad prosequendum constituted a "detainer" under the IAD, whose filing with state authorities triggered the application of the provisions of that statute. Id. Respondents Mauro and Fusco were serving state sentences in New York's penal system when the U.S. District Court for the Eastern District of New York issued ad prosequendum writs directing the state prison authorities to turn them over to the federal authorities. Id. Mauro and Fusco were arraigned in federal court and entered pleas of not guilty to the relevant charges. Id. Their trial was delayed, and because of overcrowding in federal facilities, they were returned to state custody. Id. at 344–45. Both respondents were later returned to federal custody pursuant to new ad prosequendum writs, but not before they had filed motions to dismiss the federal indictments, alleging that the United States had violated Article IV(e) of the IAD by returning them to state custody without first trying

them on the federal indictment.[21] The district court granted the motions, ruling that the ad prosequendum writs were in effect detainers, whose filing by the United States triggered application of the provisions of the IAD, Article IV(e) of which required dismissal of the indictment. Id. at 345. This decision was affirmed by the Court of Appeals for the Second Circuit. 544 F.2d 588 (2d Cir. 1976).

In the second case, No. 77–52, the respondent, Ford, was arrested in Chicago on two federal warrants. Ford was turned over to state authorities in Illinois for extradition to Massachusetts on unrelated Massachusetts state charges. Mauro, 436 U.S. at 345–46. At this point Ford requested a speedy trial on federal charges pending in the Southern District of New York, sending letters to this effect to the District Court and the U.S. Attorney for that District. Id. at 346. After Ford was transferred to Massachusetts, the U.S. Attorney in New York lodged a detainer with Massachusetts state officials. Ford was found guilty at his trial on the Massachusetts state charges. Thereupon, Massachusetts produced Ford in the U.S. District Court for the Southern District of New York pursuant to an ad prosequendum writ. Id. After Ford pled not guilty to the federal charges, his trial date was sequentially postponed for 17 months at the

[21] Article IV(e) requires dismissal of an indictment against a prisoner who is obtained by a receiving State, if he is returned to his original place of imprisonment without being tried on the indictment underlying a detainer by which custody was secured. 18 U.S.C. app. § 2 (2012).

government's or court's initiative. At some point Ford formally moved for dismissal of the federal charges on constitutional speedy trial grounds, which motion was denied by the district court. Id. In the meantime Ford had been returned to Massachusetts, where he remained until he was returned to New York for trial pursuant to another ad prosequendum writ. Id. at 347.

At the beginning of the trial Ford renewed his motion to dismiss on speedy trial grounds, which claim was again rejected by the district court. Id. He was found guilty, whereupon he appealed, alleging violation of Article IV(e) of the IAD because he was not tried within 120 days of his initial arrival in the Southern District of New York. Id. at 347–48. The Second Circuit reversed the conviction and dismissed the indictment, 550 F.2d 732 (2d Cir. 1977), holding: (1) that since the government had filed a detainer, thus triggering the provisions of the IAD to which the government was a party, (2) the subsequent ad prosequendum writ constituted a "written request for temporary custody" under Article IV(a) of the IAD, (3) which required that trial be commenced within 120 days of the prisoner's arrival in the receiving state, and therefore (4) the delay in trial mandated dismissal of the federal charges. See Mauro, 436 U.S. at 348.

The Supreme Court granted certiorari in both cases, which were consolidated for the purpose of considering "whether the Agreement governs use of writs of habeas corpus ad prosequendum by the United States to obtain state prisoners." Id. at 349 (emphasis added). The Court held "[i]n No. 76–1596

. . . that such a writ . . . is not a detainer within the meaning of the Agreement and thus does not trigger the application of the Agreement." Id. (emphasis added). However, the Court then ruled "in No. 77–52 . . . that the United States is bound by the Agreement when it activates its provisions by filing a detainer against a state prisoner and then obtains his custody by means of a writ of habeas corpus ad prosequendum." Id. (emphasis added).

Given this clear statement, I cannot fathom how a serious argument can be made that the United States is not fully bound by all the provisions of the IAD. Indeed, the Court in Mauro specifically rejected the argument that the United States "became a party to the [IAD] only in its capacity as a 'sending State.'" Id. at 353–54. As the Court emphasized:

> The statute itself gives no indication that the United States is to be exempted from the category of receiving States. To the contrary, Art. VIII states that "[t]his agreement shall enter into full force and effect as to a party State when such State has enacted the same into law."

Id. at 354 (emphasis in the original). Referring to the IAD's "brief legislative history," the Court noted that "there is no indication whatsoever that the United States' participation in the Agreement was to be a limited one." Id. at 355.[22]

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[22] In fact, neither Senator Roman Hruska (R. Neb.), who commented briefly in favor of the passage of the IAD, "nor

Having clearly established that the United States is bound by all terms of the IAD, the Court then proceeded to consider this question: under what circumstances is the IAD invoked, such that the United States becomes bound by its terms? The Court answered this question straightforwardly: "Once the Federal Government lodges a detainer against a prisoner with state prison officials, the Agreement by its express terms becomes applicable and the United States must comply with its provisions." Id. at 361–62 (emphasis added). The Court then made clear that once the IAD has been invoked, what is ostensibly an ad prosequendum writ is treated as a "request for temporary custody" under the IAD:

> [O]nce a detainer has been lodged, the United States has precipitated the very problems with which the Agreement is concerned. Because at that point the policies underlying the Agreement are fully implicated, we see no reason to give an unduly restrictive meaning to the term "written request for temporary custody." It matters not whether the Government presents the prison authorities in the sending State with a piece of paper labeled "request for

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anyone else in Congress drew a distinction between the extent of the United States' participation in the Agreement and that of the other member States, an observation that one would expect had the Federal Government entered into the Agreement as only a sending State." Id.

> temporary custody" or with a writ of habeas corpus ad prosequendum demanding the prisoner's presence in federal court on a certain day; in either case the United States is able to obtain temporary custody of the prisoner. Because the detainer remains lodged against the prisoner until the underlying charges are finally resolved, the Agreement requires that the disposition be speedy and that it be obtained before the prisoner is returned to the sending State. The fact that the prisoner is brought before the district court by means of a writ of habeas corpus ad prosequendum in no way reduces the need for this prompt disposition of the charges underlying the detainer. In this situation it clearly would permit the United States to circumvent its obligations under the Agreement to hold that an ad prosequendum writ may not be considered a written request for temporary custody.

Id. at 362 (emphasis added).

We thus come to the crux of the majority's interpretation of Mauro, which requires, according to its views of that case and the IAD, the rejection of

Governor Chafee's contentions[23] that: (1) the filing of a detainer by the United States triggered the right of Governor Chafee under Article IV(a) to refuse to surrender a prisoner within 30 days of a request for custody; and (2) allowing the United States to circumvent this provision by seeking the production of the prisoner by the use of a subsequent ad prosequendum writ in effect voids that statutory provision and renders ineffective an important right in the Agreement. The majority's view of Mauro rests, at least partially, on its statement that "Mauro . . . reject[ed] the suggestion that, if the Court upheld the time limit on the IAD proceeding, a state governor could in some other case frustrate a writ of habeas corpus by refusing to surrender a prisoner to federal court." Maj. Op. at 6. There is simply no backing in Mauro, or elsewhere, for this contention.

The majority claims that "the Court distinguished between the time limits of Article IV(c) triggered by the detainer and Article IV(a)'s reservation of the governor's power to withhold consent." Maj. Op. at 7–8 (citing Mauro, 436 U.S. at 363–64). It is true that the particular circumstances of Mauro implicated the IAD's time limit provisions. However, nothing in Mauro suggests that the Court's holding is limited such that an ad prosequendum writ is treated as a "written request" for Article IV(c) purposes but not for Article IV(a) purposes. The majority contends that such a limiting principle is

[23] Since Pleau's arguments are essentially identical to Governor Chafee's, we will refer to them as Governor Chafee's arguments.

found in the passage from Mauro that it quotes on p. 8: "We are unimpressed . . . ," Mauro, 436 U.S. at 363. Yet when one reads and analyzes what was actually stated by the Court in the cited passage, it becomes clear that the majority's reading of it is wrong.

To understand the true meaning of this passage, we must first read it in its full context. The Mauro court first stated its conclusion that "it clearly would permit the United States to circumvent its obligations under the Agreement to hold that an ad prosequendum writ may not be considered a written request for temporary custody." 436 U.S. at 362. Then, in the next paragraph of the opinion, the Court addressed some of the arguments the Government had raised in opposition to the conclusion the Court had just announced. It is in this context that the passage in question appears:

> The Government points to two provisions of the Agreement which it contends demonstrate that "written request" was not meant to include ad prosequendum writs; **neither argument is persuasive**. First, the government argues that under Article IV(a) there is to be a 30–day waiting period after the request is presented during which the Governor of the sending State may disapprove the receiving State's request. Because a writ of habeas corpus ad prosequendum is a federal-court order, it would be contrary to the Supremacy Clause, **the United States argues**, to permit a

> State to refuse to obey it. **We are unimpressed**. The proviso of Art. IV(a) does not purport to augment the State's authority to dishonor such a writ. As the history of the provision makes clear, it was meant to do no more than **preserve previously existing rights of sending States**, not to expand them. **[Fn. 28. Both Committee Reports note that "a Governor's right to refuse to make a prisoner available is preserved . . . ." The Council of State Governments discussed the provision in similar terms: "[A] Governor's right to refuse to make the prisoner available (on public policy grounds) is retained.] If** a State never had authority to dishonor an ad prosequendum writ by a federal court, then this provision could not be read as providing such authority. Accordingly, we do not view the provision as being inconsistent with the inclusion of writs of habeas corpus ad prosequendum within the meaning of "written requests."

Id. at 363 (bold emphasis added; underlined emphasis in original) (internal citations omitted).

When the passage is read in context, its meaning is plain. The Court did not say that it was "unimpressed" with the possibility that a state could disobey an ad prosequendum writ that was treated as

a request for custody under the IAD. Instead, the Court said it was "unimpressed" with the Government's argument, which was that treating an ad prosequendum writ as a request for custody under the IAD, pursuant to which the state could refuse to obey, would create a Supremacy Clause problem. The Court was "unimpressed" with the Government's argument because Article IV(a) did not expand the rights of the states in this respect but merely "preserved" and "retained" previously existing rights of a Governor "to refuse to make the prisoner available (on public policy grounds)." Id. at 363 n.28.[24] Since treating an ad prosequendum writ as a written request did not expand States' rights in any way, it could not have implicated the Supremacy Clause in any way.

Moreover, if anything, the statement regarding the possibility of dishonoring of the writ by State authorities is patently conditional, and not a statement as to the actual state of the law. "If" there

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[24] As noted by the majority, see Maj. Op. at 9 n.2, the report of the Council of State Governments states the following: "The possibility [of the Governor withholding consent] is left open merely to accommodate situations involving public policy which occasionally have been found in the history of extradition" (citation omitted). The majority suggests that because public policy considerations had in the past arisen in the extradition context, a state's right of refusal was limited to that context. However, the Supreme Court in Mauro apparently deemed the extradition context irrelevant, as neither the Court's discussion nor its quote from the Council report mentions extradition. This makes sense: just because public policy considerations had arisen in the extradition context does not justify limiting a state's right of refusal to the extradition context.

was no pre-existing right to refuse, then Article IV(a) did not create it.[25] Id. at 363 (emphasis added). However, as the Court specified and emphasized in Footnote 28, which immediately precedes this conditional "if," the Governor's right to refuse to make the prisoner available was "preserved" and "retained". Id. at 363 n.28 (emphasis in original).

The United States's interpretation of Article IV(a), as adopted by the majority, would balkanize that provision. According to that view, the Government would be bound by Mauro as to what is meant by "written request for temporary custody" once a detainer has been filed with the state authorities, but would be free to disregard those other parts of Article IV(a) that it now finds inconvenient to follow. Such an unprincipled reading of the IAD and Mauro is not only unwarranted and unprecedented, but borrowing from the majority, "fails the test of common sense." Maj. Op. at 12.[26]

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[25] This conditional language was used because there was no issue before the Court in Mauro regarding a refusal by a governor to turn over a state prisoner, much less a refusal to turn over a state prisoner upon the filing of a detainer, and thereafter attempting to circumvent a governor's refusal by using a habeas writ. Thus, the majority's claim that Mauro decides this issue against Pleau and Governor Chafee contentions is unsustainable.

[26] In fact, the Mauro Court was well aware of the danger of allowing the government to pick and choose which parts of the IAD it wanted to obey. This is made clear by the manner in which the Court rejected the second of the two arguments that the government had raised against treating an ad prosequendum writ as a request for custody:

## IV.

The majority takes the position it does because it fears that "[w]ere Pleau and Governor Chafee to prevail, Pleau could be permanently immune from federal prosecution, and the use of the efficient detainer system badly compromised." Maj. Op. at 13. However, as the Mauro Court noted, the United States has a simple way of avoiding the type of problem it created for itself in this case:

> [a]s our judgment in No. 76–1596 indicates, the Government need not

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> The Government also points out that the speedy trial requirement of Art. IV(c) by its terms applies only to a "proceeding made possible by this article . . . ." When a prisoner is brought before a district court by means of an ad prosequendum writ, the Government argues, the subsequent proceedings are not made possible by Art. IV because the United States was able to obtain prisoners in that manner long before it entered into the Agreement. We do not accept the Government's narrow reading of this provision; rather we view Art. IV(c) as requiring commencement of trial within 120 days whenever the receiving State initiates the disposition of charges underlying a detainer it has previously lodged against a state prisoner. Any other reading of this section would allow the Government to gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action.

Id. at 363–64 (emphasis added).

> proceed by way of the Agreement. It may obtain a state prisoner by means of an ad prosequendum writ without ever filing a detainer; in such a case, the Agreement is inapplicable. It is only when the Government does file a detainer that it becomes bound by the agreement's provisions.

436 at 364 n.30. See also id. at 362 n.26 ("These problems, of course, would not arise if a detainer had never been lodged and the writ alone had been used to remove the prisoner, for the writ would have run its course and would no longer be operative upon the prisoner's return to state custody."). It was the United States's choice to proceed against Pleau by invoking the IAD. The consequences of allowing the United States to avoid its obligations under a validly-enacted compact are surely graver than the consequences of allowing Rhode Island's justice system to prosecute Pleau.

**V.**

Lastly, I do not believe that Governor Chafee's references to Ponzi v. Fessenden, 258 U.S. 254, 260–62 (1922), McDonald v. Ciccone, 409 F.2d 28, 30 (8th Cir. 1969), Stamphill v. Johnson, 136 F.2d 291, 292 (9th Cir. 1943), cert. denied, 320 U.S. 766 (1943), or Lunsford v. Hudspeth, 126 F.2d 653, 655 (10th Cir. 1942), can be dismissed as cavalierly as is attempted by the majority in its claim that they are not of help in deciphering the correct answer to the questions presented by the present appeal. Maj. Op. at 10 & n.8. Nor do I agree with the majority's conclusion

that the holding in United States v. Scheer, 729 F.2d 164, 170 (2d Cir. 1984), which is clearly favorable to Governor Chafee's position, is either dicta or "properly described as a misreading of Mauro." Maj. Op. at 11–12. A balanced appraisal of these cases, when they are actually read and analyzed, creates some doubt as to the majority's dismissal.

In Scheer the Second Circuit passed upon the very issue before us: the effect on Article IV(a) of the IAD of a habeas writ filed subsequent to a detainer. A federal grand jury in Vermont indicted Scheer for several alleged violations of federal firearms statutes. 729 F.2d at 165. Thereafter, on March 15, 1982, Scheer was arrested in California on state criminal charges. Id. While Scheer was in jail awaiting disposition of the state charges, the federal authorities learned of his whereabouts, and in April, pursuant to the IAD, filed a detainer with the California authorities on the federal charges pending in Vermont. Id. On May 27 Scheer pled guilty to the California charges and was sentenced to 16 months imprisonment. At this point, Scheer contacted the U.S. Attorney's Office in Vermont requesting a prompt resolution of the federal charges, following this request with a June 7 telegram substantially repeating this petition. Id. In the meantime, on May 28, the government secured an ad prosequendum writ from the District Court in Vermont, which was executed on June 5 when U.S. Marshals took custody of Scheer and proceeded to bring him to Vermont. Id. After Scheer was arraigned in the District of Vermont, a series of motions and incidences followed, with Scheer's trial date finally set for March 2, 1983. Id. at 165–66. Prior thereto, Scheer filed a motion to

dismiss claiming that the government had violated several provisions of the IAD. Id. at 166. The motions were denied and immediately thereafter Scheer was tried and found guilty. Id. This outcome was set aside and a new trial was granted, before which Scheer entered a plea of guilty, reserving the right to appeal his claims under the IAD. Id.

Although Scheer alleged violations of Article IV(a), (b), and (c), only the disposition regarding paragraph (a) is of direct interest to this appeal. Scheer argued that Article IV(a) was violated because the U.S. Marshals transferred him to Vermont less than 30 days after the issuance of the ad prosequendum writ. Id. at 170. The court ultimately rejected this argument on the ground that Scheer had waived his right to contest the transfer. Id. at 170–71. However, in so ruling, the court clarified the relationship between an ad prosequendum writ and the IAD:

> The 30–day provision was plainly inserted into the law to permit the . . . Governor of the sending state to order that the prisoner not be transferred. 11 Cong. Rec. 14,000, 38,841. Although it could be argued that the proviso applies only to "State" parties to the Agreement and not the United States, that position is difficult to justify since the definition of "State" in the Act includes the United States. What little legislative history exists indicates that the United States and the District of Columbia became full parties to the Agreement with the

States . . . More significantly, the Supreme Court has indicated that Article IV(a) envisions that following the filing of a written notice of request for custody "[f]or the next 30 days, the prisoner and prosecutor must wait while the Governor of the sending State, on his own motion or that of the prisoner, decides whether to disapprove the request." Cuyler v. Adams, 449 U.S. 433, 444 (1981).

The Government urges that we hold the 30–day period not violated because the writ of habeas corpus ad prosequendum was not abrogated by the United States becoming a party to the Act. We recognize that the historic power of a federal court to issue such a writ to secure a state prisoner for federal trial has existed since Chief Justice Marshall held it was included under the rubric of habeas corpus . . . . Nonetheless, employing that rationale would be treating the federal government's participation in the IAD on a different footing than that of the States. Further, the Supreme Court has held that once a detainer has been lodged as here, it triggers the procedural rules of the ACT so that the later filing of a writ of habeas corpus ad prosequendum is simply equivalent to a "written request for temporary custody" and may not be used as a basis for the federal

> government to avoid its obligations under the Act. United States v. Mauro, 436 U.S. at 362. Thus the power of the writ seems unavailing once the government elects to file a detainer in the course of obtaining a state prisoner's presence for disposition of federal charges.

729 F.2d at 170 (emphasis added).

Ponzi, on which several of the cases cited by Chafee and Pleau are based, also bears closer analysis than is given by the majority. The majority points out that Ponzi "neither held nor said that a state governor may invoke comity principles to disobey a federal habeas writ." Maj. Op. at 10. But nor did Ponzi say the opposite: that a state governor may not disobey a federal writ. Ponzi is important because, since it is a pre-IAD case, its explanation of the principle of comity sheds light on the rights that existed prior to the Agreement, which were "preserved" and "retained" by the State governors under Article IV(a). Mauro, 436 U.S. at 363 n.28 (emphasis in original). As Chief Justice Taft explained in Ponzi:

> The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court

> shall attempt to take it for its purpose. The principle is stated by Mr. Justice Matthews in Covell v. Heyman . . . as follows:
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> "The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise toward each other whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between the state courts and those of the United States it is something more. It [is] a principle of right and law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent: and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and When one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."

258 U.S. at 260 (quoting Covell v. Heyman, 111 U.S. 176, 182 (1884)).

The cases that the majority claims "misread[ ]" Ponzi, Maj. Op. at 9, do nothing of the sort. In Lunsford, the Tenth Circuit cited Ponzi for the

> now axiomatic rule of law that a sovereignty, or its courts, having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction and remedy is exhausted and no other sovereignty, or its courts, has the right or power to interfere with such custody or possession . . . As an easy and flexible means of administering justice and of affording each sovereignty the right and opportunity to exhaust its remedy for wrongs committed against it, there has evolved the now well established rule of comity which is reciprocal, whereby one sovereignty having exclusive jurisdiction of a person may temporarily waive its right to the exclusive jurisdiction of such person for purposes of trial in the courts of another sovereignty . . . The privileges granted by this flexible rule of comity should and must be respected by the sovereignty to which it is made available, and this respectful duty is reciprocal, whether federal or state . . . .

Lunsford, 126 F.2d at 655. Similarly, in Stamphill, the Ninth Circuit relied on Ponzi for the proposition that

> [t]here is no doubt that the state of Oklahoma, having first acquired jurisdiction over the appellant, was entitled to retain him in custody until he had finished his sentence and could not be required to surrender him to the custody of the United States marshal for trial in the federal court for an offense committed in violation of federal law.

136 F.2d at 292. In McDonnell, in turn, the Eighth Circuit relied on both Stamphill and Lunsford for the proposition that although the federal court in Texas could issue a writ of habeas corpus ad prosequendum, "[t]he release by the state authorities . . . is achieved as a matter of comity and not of right." 409 F.2d at 30. In light of Ponzi's reference to a "principle of comity . . . between the state courts and those of the United States" that is a "principle of right and law, and therefore, of necessity," 258 U.S. at 260 (quoting Covell, 111 U.S. at 182), I fail to see how Stamphill, Lunsford, and McDonnell can be said to have "misread" Ponzi in any way.

**VI.**

The sum and summary of all of the matters that I have punctuated leads to an inevitable and straightforward outcome, one which, like the forest for the trees, is ignored by some. We are confronted with two federal statutes -- the IAD and the habeas corpus statute, 28 U.S.C. § 2241. We have a Supreme Court case -- Mauro -- that plainly explains how these statutes interact. From these three guideposts,

the proper legal route is easily charted:

1. The IAD is an interstate compact which, upon Congressional approval, the United States joined as an equal member with 48 other States, this Agreement becoming federal law.

2. The filing of a detainer against Pleau by the United States triggered the application of the full Agreement, including all of the rights that the United States granted to other States under the Agreement.

3. Under Mauro, because the United States triggered the IAD before seeking an ad prosequendum writ, the writ is treated as a request for custody under the IAD.

4. Because the writ is treated as a request for custody under the IAD, Governor Chafee had the right under Article IV(a) to refuse to transfer Pleau.

I cannot agree with the contrary result reached by the majority. The Supremacy Clause does not justify the majority's result because the Supremacy Clause is not implicated here. Mauro cannot justify the result because Mauro, properly read, supports the panel's original opinion. The equities of the case, even if they weighed in favor of the United States (and they do not), cannot justify the majority's result because this court has no authority to ignore the express terms of the IAD.

I respectfully dissent.

**United States Court of Appeals**
**For the First Circuit**

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No. 11–1775

UNITED STATES OF AMERICA,

Appellee,

v.

JASON WAYNE PLEAU

Defendant, Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

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No. 11–1782

IN RE: JASON WAYNE PLEAU,

Petitioner.

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PETITION FOR A WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. William E. Smith, U.S. District Judge]

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Before
Torruella, Boudin, and Thompson,
Circuit Judges.

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Robert B. Mann, with whom Mann & Mitchell, David P. Hoose, and Sasson, Turnbull & Hoose, was on brief for appellant-petitioner.

Claire Richards, Chief Legal Officer, on brief for amicus curiae Governor Lincoln D. Chafee in support of appellant-petitioner.

Donald C. Lockhart, Assistant United States Attorney, with whom Peter F. Neronha, United States Attorney, was on brief for appellee.

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October 13, 2011

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**TORRUELLA, Circuit Judge.** Petitioner Jason Wayne Pleau is accused of the armed robbery and murder of a gas station manager in Rhode Island. Pleau is currently serving an eighteen–year sentence in Rhode Island state prison for parole and probation violations, and has agreed to plead guilty to state charges stemming from the robbery and murder and to accept a sentence of life imprisonment without the possibility of parole. The issue presented

in the current petition is whether the United States, after being rebuffed by the state of Rhode Island in its attempt to take custody of Pleau under the Interstate Agreement on Detainers (IAD), 18 U.S.C. App. § 2, may compel the same result by means of a writ of habeas corpus ad prosequendum. The issue is brought to us accompanied by a statement by Rhode Island Governor Lincoln Chafee that he would not transfer Pleau to federal custody because doing so would expose Pleau, a Rhode Island citizen, to a potential death sentence on federal charges, in contravention to Rhode Island's longstanding rejection of capital punishment.

The petition presents a question of first impression in this court, as it appears that never before has a state governor denied a federal request for custody under the IAD. For the reasons stated below, we hold that the federal government is entitled to choose between the IAD and an ad prosequendum writ in seeking custody of a state prisoner for purposes of a federal prosecution, but that once the federal government has put the gears of the IAD into motion, it is bound by the IAD's terms, including its express reservation of a right of refusal to the governor of the sending state.

## I. Background.

### A. Facts & procedural posture.

On September 20, 2010, Pleau, along with two others, allegedly robbed a Woonsocket, RI gas station manager who was on his way to the bank to deposit the day's receipts. Pleau is alleged to have shot the

victim, David Main, to death during the robbery. On November 18, 2010, the United States filed a criminal complaint in the United States District Court for the District of Rhode Island, and an arrest warrant was issued. Shortly thereafter, on November 22, the United States Marshals Service lodged a detainer with the warden of Rhode Island's Adult Correctional Institution, High Security Unit in Cranston, Rhode Island, where Pleau is currently serving a sentence for parole and probation violations. Pleau and his alleged cohorts were then indicted for robbery affecting interstate commerce, 18 U.S.C. § 1951(a); conspiracy to commit robbery affecting interstate commerce; and possessing, using, carrying, and discharging a firearm in relation to a crime of violence, 18 U.S.C. §§ 924(c)(1)(A) and (j)(1). The indictment noted that Pleau and his co-defendants are eligible for the death penalty, and specified statutory aggravating factors.

In order to facilitate Pleau's prosecution under the federal indictment, the district court entered an order transmitting the United States' request for temporary custody of Pleau under the IAD on May 25, 2011. Approximately one month later, Rhode Island Governor Lincoln Chafee denied the request for custody, citing Article IV(a) of the IAD, which states, in pertinent part, that after a request for temporary custody has been made, "there shall be a period of thirty days . . . within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner." 18 U.S.C. App. § 2, art. IV(a). Pursuant to 28 U.S.C. § 2241(c)(5), the federal government then petitioned

the district court for a writ of habeas corpus ad prosequendum, a form of habeas used to secure a defendant's presence in court. Pleau filed a motion opposing the request on the same day.

On June 30, the district court granted the Government's request, holding that Pleau lacked standing to challenge the issuance of the writ and denying his claim on the merits as well. The district court, noting that "[i]t appears that this is the first time a governor has dishonored a request by the United States" under the IAD, held that when the IAD "has been invoked and a detainer lodged against a state prisoner, Article IV may afford the governor of the sending State the right to dishonor the request to transfer . . . but, in all events does not empower him, or his agents, to disobey a federal court's writ of habeas corpus ad prosequendum as to that prisoner." United States v. Pleau, No. CR. 10–184–1S, 2011 WL 2605301, at *3 (D.R.I. June 30, 2011). The court issued the writ requiring Pleau's presence in federal court on Friday, July 8, 2011 at 11:00 a.m. for arraignment.

Pleau filed a motion in this court to stay execution of the writ as well as a motion seeking a writ of prohibition. On July 7, 2011, we granted a stay, directing the parties to file briefs and setting the case for oral argument. Governor Chafee appeared before this court first as an amicus curiae supporting Pleau, and later as an intervenor-appellant.

## B. The IAD and habeas corpus ad prosequendum

Before turning to the merits, we briefly sketch the background of the IAD and ad prosequendum writs, as well as the standards governing the use of writs of mandamus and prohibition.

The IAD, adopted by Congress in 1970, is an agreement between forty-eight states, the District of Columbia, Puerto Rico, the Virgin Islands, and the United States. United States v. Currier, 836 F.2d 11, 13–14 (1st Cir. 1987). The IAD was intended to "encourage the expeditious and orderly disposition" of outstanding charges against a defendant based on untried indictments, informations, or complaints from multiple jurisdictions, 18 U.S.C. App. § 2, art. I, and to "provide cooperative procedures among member States to facilitate such disposition." United States v. Mauro, 436 U.S. 340, 351 (1978).

To obtain custody under the IAD, the requesting state must first file a "detainer" with the state with custody, notifying the custodial state of the untried charges pending against the prisoner. See United States v. Kenaan, 557 F.2d 912, 915 (1st Cir. 1977) ("A detainer is a formal notification, lodged with the authority under which a prisoner is confined, advising that the prisoner is wanted for prosecution in another jurisdiction."). To actually obtain custody, the requesting state must additionally file with the sending state a written request for custody, at which point the latter state has thirty days in which to determine whether to honor the request. 18 U.S.C. App. § 2, art. IV(a);

Mauro, 436 U.S. at 351–52.

Like requests for custody under the IAD, writs of habeas corpus ad prosequendum are creatures of statute. Ad prosequendum writs were first interpreted as arising out of the First Judiciary Act, 1 Stat. 81-82 (1789), by Chief Justice Marshall in Ex parte Bollman, 8 U.S. (4 Cranch) 75, 98 (1807). In that case, Chief Justice Marshall distinguished varieties of habeas, describing habeas corpus ad prosequendum as the form of the writ "which issue[s] when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed." Id. The present-day writ arises under 28 U.S.C. § 2241(c)(5). See Kenaan, 557 F.2d at 916 ("A federal writ of habeas corpus [ad prosequendum] under § 2241 is . . . a federal court order, commanding the presentation of a prisoner for prosecution or as a witness in a federal court. It is judicially controlled by the federal district court, which may issue it for the production of a prisoner when 'it is necessary to bring him into court to testify or for trial." (quoting 28 U.S.C. § 2241(c)(5))). See also Carbo v. United States, 364 U.S. 611, 613–20 (1961) (discussing the history of ad prosequendum writs).

### C. Writs of prohibition.

The All Writs Act, 28 U.S.C. § 1651(a), empowers federal courts to issue extraordinary (or "prerogative") writs where "necessary or appropriate in aid of their respective jurisdictions." Writs of mandamus instruct lower courts to take certain

specified acts; writs of prohibition instruct them to refrain from doing so. See In re Perry, 859 F.2d 1043, 1044 n.1 (1st Cir. 1988); In re Pearson, 990 F.2d 653, 656 (1st Cir. 1993). As such, writs of mandamus and writs of prohibition are mirror images of each other, and "derive from the same statutory basis and incorporate the same standards." In re Justices of the Superior Court Dep't of the Mass. Trial Court (In re Mass. Trial Court), 218 F.3d 11, 15 n.3 (1st Cir. 2000). We therefore "make no distinction between them," In re Atl. Pipe Corp., 304 F.3d 135, 138 n.1 (1st Cir. 2002), and "will continue the practice of referring to them interchangeably." In re Mass. Trial Court, 218 F.3d at 15 n.3.

Like mandamus, a writ of prohibition is a "drastic remedy, to be used sparingly and only in unusual circumstances." In re Mass. Trial Court, 218 F.3d at 15 (internal quotation marks omitted). The standards for determining when it is appropriate to issue a writ of mandamus or prohibition reflect the writs' anomalous character. The First Circuit has acknowledged two subspecies of mandamus writs: supervisory and advisory.[1] Supervisory mandamus is

[1] Although the cases discussing the supervisory/advisory/distinction do so in the context of writs of mandamus, given that writs of prohibition are "merely the obverse" of writs of mandamus, In re Atl. Pipe Corp., 304 F.3d at 138 n.1, we presume that the supervisory/advisory distinction applies in the context of writs of prohibition as well. See, e.g., In re Sony BMG Music Entm't, 564 F.3d 1, 9–10 (1st Cir. 2009) (exercising our "advisory mandamus authority" to issue a writ "prohibit[ing] enforcement of the challenged order") (emphasis added).

used "to correct an established trial court practice that significantly distorts proper procedure." United States v. Horn, 29 F.3d 754, 769 n.19 (1st Cir. 1994). This form of mandamus "is ordinarily appropriate in those rare cases in which the issuance (or nonissuance) of an order presents a question anent the limits of judicial power, poses some special risk of irreparable harm to the appellant, and is palpably erroneous." Id. at 769. Supervisory mandamus requires the petitioner to "show both that there is a clear entitlement to the relief requested, and that irreparable harm will likely occur if the writ is withheld." In re Cargill, Inc., 66 F.3d 1256, 1260 (1st Cir. 1995).

By contrast, advisory mandamus is not directed at "established" practices, Horn, 29 F.3d at 769 n.19, but rather at resolving issues that are "novel, of great public importance, and likely to recur." Id. at 769. A case may be fit for advisory mandamus when it presents a "systematically important issue as to which this court has not yet spoken." In re Atl. Pipe Corp., 304 F.3d at 140; see also In re Mass. Trial Court, 218 F.3d at 15 n.4; In re The Justices of the Supreme Court of P.R., 695 F.2d 17, 25 (1st Cir. 1982) (recognizing advisory mandamus as appropriate when "[t]he issue presented is novel in this circuit, it is important, and . . . may well recur before further appellate review is possible"). Advisory mandamus has its roots in the Supreme Court's acknowledgment that federal courts of appeal have "the power to review . . . basic, undecided question[s]." Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); see also Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86

Harv. L. Rev. 595, 596 (1972) (describing Schlagenhauf as holding that "in certain prescribed circumstances, the courts of appeals could properly decide 'novel and important' questions of law brought to them on petitions for mandamus").

## III. Discussion

### A. Standing.

As an initial matter, we note that Governor Chafee's intervention in the present appeal moots a simmering dispute between the original parties -- Pleau and the United States -- as to whether Pleau had standing to contest the issuance of the habeas writ. The district court noted that it is "axiomatic" that "a state prisoner is without standing to contest a federal court's issuance of a writ of habeas corpus ad prosequendum." Pleau, 2011 WL 2605301, at *2 (emphasis in original) (internal quotation marks omitted) (quoting Derengowski v. U.S. Marshal, 377 F.2d 223, 223 (8th Cir. 1967)). The district court rejected Pleau's argument, renewed on appeal, that the Supreme Court's recent decision in Bond v. United States, 131 S. Ct. 2355 (2011), implies that he does have standing as he is challenging "governmental action taken in excess of the authority that federalism defines," id. at 2363–64. See Pleau, 2011 WL 2605301, at *2.

The United States insists that Pleau does not have standing "to interfere with agreements (or disagreements) between executives concerning custody transfers," in part because a state prisoner "may not complain if one sovereignty waives its strict

right to exclusive custody of him," as "[s]uch a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it." Ponzi v. Fessenden, 258 U.S. 254, 260 (1922). At oral argument, the United States represented that if Pleau does not have standing, then this case is left with "no legitimate party."

However, Governor Chafee has since sought and been granted leave to intervene in this case in order to "fully vindicate his rights under the IAD." Governor Chafee, like Pleau, argues that once the United States has invoked the IAD, it may not later circumvent the IAD's express allocation of a right of refusal to the governor of the sending state by means of an ad prosequendum writ. Given that no one contests that Governor Chafee, as the representative of Rhode Island, has standing to raise such a claim, the concerns regarding whether Pleau does or does not have standing to challenge the issuance of the ad prosequendum are now moot, and we express no opinion on the merits of that issue.

**B. Which writ?**

The United States insists that Pleau's arguments[2] do not meet the standards for mandamus. The United States argues that Pleau cannot establish (a) that he is "clearly entitled" to relief, or (b) that he is likely to suffer irreparable

[2] Because Governor Chafee's and Pleau's arguments are substantially similar, we treat them as one and the same.

harm. In mounting this argument, the United States evidently presupposes that the applicable writ is supervisory in character. However, as noted above, supervisory mandamus is directed at correcting "established" trial court practices. Horn, 29 F.3d at 769 n.19. The parties, as well as the district court, have represented that Governor Chafee's denial of the United States' IAD request for custody over Pleau -- which precipitated the current appeal -- is the first time that a state has denied an IAD request by the federal government. The issue presented by this petition thus does not concern an established trial court practice, but is rather novel and a matter of first impression. It is thus more properly viewed under the rubric of advisory, rather than supervisory, prerogative writs.

The standard for an advisory writ of prohibition does not overlap with that for a supervisory writ. See Horn, 29 F.3d at 769 (recognizing that advisory mandamus may lie "even though all the usual standards [of supervisory mandamus] are not met") (emphasis added). It is therefore not incumbent upon Pleau to show irreparable harm or clear entitlement to relief. See In re Sony BMG Music Entm't, 564 F.3d 1, 4 (1st Cir. 2009) ("When advisory mandamus is in play, a demonstration of irreparable harm is unnecessary."); In re Atl. Pipe Corp., 304 F.3d at 139 (noting that a showing of a risk of irreparable harm and palpable error "typically apply only to supervisory mandamus") (emphasis in original). The applicable standard is, rather, whether the issue raised by Pleau is novel, of great or systemic importance, and likely to recur prior to effective review.

We believe the question presented meets all three criteria. Governor Chafee's denial of the United States' request for custody of Pleau appears to be unprecedented. The question of whether a state governor retains his or her prerogative under the IAD to deny a subsequent request for custody, even when that occurs under the guise of an ad prosequendum writ, has never been squarely considered by the First Circuit. Nor, for reasons we explain more fully below, is Supreme Court precedent dispositive on this point. The question raised by Pleau's petition is novel.

The question is also of great and systemic importance. As Governor Chafee made clear in a statement released on the same day as his denial of the IAD request, he opposes transferring Pleau to federal custody on grounds of Rhode Island's "longstanding policy" against capital punishment. While Governor Chafee's refusal to allow the federal government to seek the execution of a Rhode Island citizen "in no way minimize[s] the tragic and senseless nature" of Main's murder, he stated that he could not "in good conscience" allow the federal government to ride roughshod over Rhode Island's "conscious[] reject[ion]" of execution as an acceptable form of state punishment. Pleau had, at this point, already indicated his agreement to plead guilty to the state charges and accept a sentence of life without the possibility of parole. Therefore, the only additional punishment that a federal conviction might bring would appear to be authorization to kill Pleau. The present case thus presents a stark conflict between federal and state policy prerogatives

on a matter of literally life-and-death significance.[3]

Finally, given the unsettled character of the question presented, the numerous states and territories that are party to the IAD, and the fact that, as the United States has represented to us, thousands of ad prosequendum writs are issued each year, it is not unreasonable to suspect that the question presented in the instant petition is likely to recur. Indeed, insofar as the United States is correct that the typical criminal defendant lacks standing to challenge the issuance of an ad prosequendum writ -- whether issued before or after the invocation of the IAD -- the question presented "may well recur before further appellate review is possible." In re The Justices of the Supreme Court of P.R., 695 F.2d at 25.

Moreover, Governor Chafee's invocation of the IAD and intervention in this case present a unique opportunity for review of this slippery issue: the Governor unquestionably has standing, where Pleau might or might not. The Governor's standing,

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[3] We pause to note that the crimes Pleau is alleged to have committed -- armed robbery and murder -- are quintessential state crimes, and betray on their face no hint of any uniquely federal interest. See United States v. Jiménez-Torres, 435 F.3d 3, 14–15 (1st Cir. 2006) (Torruella, J., concurring) (objecting to unwarranted extension of federal criminal jurisdiction over traditionally state crimes). Moreover, given that Pleau has already agreed to plead guilty to state charges and accept a life sentence without the possibility of parole, it is frankly unclear what is to be gained from pursuing federal charges in this case, particularly in light of the truly extraordinary costs of capital litigation.

though, might evaporate if Pleau were transferred, in which case it is unclear what remedy might be available to the Governor. This means that on direct appeal, if Pleau also lacks standing to challenge his transfer under the IAD (as the United States insists) then this question will evade effective review.[4] In the end, we very well might not be able to consider this easily duplicable and important question if not now.

We conclude that Pleau's petition meets the standard for an advisory writ of prohibition. As prerogative writs such as writs of prohibition are discretionary rather than mandatory, we now turn to consider whether the writ should issue.

**C. The merits.**

Article VI, Clause 2 of the Constitution, otherwise known as the Supremacy Clause, states in part that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary

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[4] Other cases, including Mauro, have addressed IAD questions on direct appeal, although always in the context of a prisoner asserting his own rights under the IAD, such as his speedy trial rights. See, e.g., Mauro, 436 U.S. at 348; New York v. Hill, 528 U.S. 110, 118 (2000) (holding that the defendant's speedy trial right under the IAD had been waived). No case has ever addressed the IAD on appeal in the context of a prisoner standing in for a sending-state governor who refuses a transfer under Article IV of the IAD. Cf., e.g., id. at 118 n.3 (recognizing that "the sending State may have interests distinct from those of the prisoner," and noting that the Hill case "does not involve any objection from the sending State"). We repeat that this situation is unique.

notwithstanding." As we have previously noted, a federal court's authority to issue a writ of habeas corpus ad prosequendum is grounded on a federal statute, 28 U.S.C. § 2241(c)(5). Prima facie, it might well be the case that a state's refusal to honor an ad prosequendum writ would normally raise serious issues under the Supremacy Clause.

However, that is not the case now before us. Governor Chafee has not asserted a free-standing right to ignore federal ad prosequendum writs. Governor Chafee asserts, rather, that he is authorized under Article IV(a)[5] of the IAD to decide whether to honor a request for custody made by a receiving state, and that an ad prosequendum writ that post-dates the invocation of the IAD is, under federal law, treated as just such a written request. We have previously explained that, as a "congressionally sanctioned interstate compact within the compact clause, the [IAD] is a federal law subject to federal construction." Currier, 836 F.2d at 13 (citation omitted). Therefore, the case now before us involves two federal statutes and the question of how they may be interpreted such that each is given effect in a manner that is consistent with the operation of the other.

The United States insists that Pleau's petition

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[5] Section 2 of the Interstate Agreement on Detainers Act "sets forth the agreement as [originally] adopted by the United States and by other member jurisdictions." Mauro, 436 U.S. at 343 n.1. Provisions of the Agreement will be referred to by their article numbers as set forth in 18 U.S.C. App. § 2.

has already been foreclosed by the Supreme Court's decision in Mauro, in which the Court stated that Article IV(a) of the IAD "does not purport to augment the State's authority to dishonor" an ad prosequendum writ, and that "[i]f a State has never had authority to dishonor an ad prosequendum writ issued by a federal court, then this provision could not be read as providing such authority." Mauro, 436 U.S. at 363. Several other circuits have subsequently arrived at similar conclusions. See United States v. Trafny, 311 F. App'x. 92, 95–96 (10th Cir. 2009); United States v. Graham, 622 F.2d 57, 59–60 (3d Cir. 1980); United States v. Bryant, 612 F.2d 799, 802 (4th Cir. 1979).[6] But see United States v. Scheer, 729 6 F.2d 164, 170 (2d Cir. 1984) (stating that "the historic power of the [ad prosequendum] writ seems unavailing once the government elects to file a detainer in the course of obtaining a state prisoner's presence for disposition of federal charges.")

We are not as confident that Mauro is quite as clear as claimed by the United States. After all, Mauro had two core holdings which were necessary to resolving the cases consolidated before the Court, and both of these holdings undermine rather than support the United States' position. First, the Court

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[6] Significantly, in none of these cases did the governor of the sending state actually disapprove the federal government's IAD request or seek to block transfer under a subsequent ad prosequendum writ. See Trafny, 311 F. App'x at 94 (state governor acquiesced in defendant's transfer to United States' custody within thirty days of the issuance of the ad prosequendum writ); Graham, 622 F.2d at 58 (same); Bryant, 612 F.2d at 801 (same).

held that the United States is a party to the IAD not just as a sending state, but as a receiving one as well, and that it is therefore not exempt from the restrictions the IAD places on receiving states. Mauro, 436 U.S. at 354. Second, the Court held that while the federal government could choose to seek custody over a state prisoner by means of an initial habeas writ or under the IAD, once an effective IAD detainer had been lodged, "the Agreement by its express terms becomes applicable and the United States must comply with its provisions." Id. at 362. "[O]nce a detainer has been lodged," the Court noted, "the policies underlying the [IAD] are fully implicated," and thus there is "no reason to give an unduly restrictive meaning to the term 'written request for temporary custody." Id. Under these circumstances, "it clearly would permit the United States to circumvent its obligations under the Agreement to hold that an ad prosequendum writ may not be considered a written request for temporary custody." Id. Both of these holdings indicate that the United States stands, for purposes of the IAD, on an equivalent footing with other states, and that, once it has invoked the IAD, it is bound by the terms thereof, including Article IV(a).

Moreover, the interpretation of Mauro advanced by the United States is not in any way self-evident. First, the portion of Mauro cited by the United States occurs directly after the Court announced the rule that subsequent ad prosequendum writs are to be treated as written requests under the IAD. See Mauro, 436 U.S. at 362–63. We do not believe the portion of Mauro cited by the Government must be read as stipulating a

somewhat mysterious and implicit carve out to the rule the Supreme Court had just announced. Rather, it is at least equally plausible to understand the Mauro majority as reaffirming that although states did not historically have the power to ignore federal habeas writs at will and were not granted that power by the IAD, nevertheless, under certain circumstances, what is ostensibly a federal ad prosequendum writ is in effect a request for temporary custody under the IAD, and -- under those circumstances -- subject to the restrictions imposed on such requests.

Second, Mauro's suggestion that a governor lacks the power to reject an ad prosequendum writ acting as a request for temporary custody under the IAD occurs only in a conditional phrase: "If a State has never had authority to dishonor an ad prosequendum writ issued by a federal court, then this provision could not be read as providing such authority." 436 U.S. at 363 (emphasis added). We do not read this conditional language as overriding Mauro's clear holding that an ad prosequendum writ following a detainer is a "request for custody" subject to the IAD. Once the IAD is invoked, it applies in its entirety.

We have on one occasion suggested a contrary result in dicta. See Kenaan, 557 F.2d at 916 n.8. However, Kenaan's dictum, which predates Mauro, has since been superseded by more recent authority. In Currier, we relied on Mauro for the proposition that "once a detainer is lodged against a prisoner, any subsequent writ issued against that same prisoner is a 'written request for temporary custody'

under the Agreement." 836 F.2d at 14 (citing Mauro, 436 U.S. at 361–64). We did not rely on Mauro for the proposition that any subsequent ad prosequendum writ is equivalent to a request for temporary custody -- except as to Article IV(a). Our language in Currier was clear and without qualification, and it plainly follows therefrom that subsequent ad prosequendum writs are, qua IAD requests, subject to the sending state's right of refusal under Article IV(a) of the IAD. Although Currier is distinct insofar as the governor in that case did not seek to challenge a subsequent ad prosequendum writ, we nevertheless note that Currier's interpretation of Mauro remains good law in this circuit.

Our result is further borne out by longstanding principles of statutory interpretation. First, we note that the IAD specifically excepts the United States from certain requirements, but not from a governor's right to refuse a transfer. The maxim expressio unius est exclusio alterius comes to mind: in determining the effect of an amendment to existing statutory law, "[e]xceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 47:23 (7th ed. 2010). In the context of the IAD, Congress amended the IAD after Mauro to add specific exceptions treating the United States differently from other parties.[7] Pub. L. No. 100–960,

[7] For example, if a receiving state other than the United States does not hold a trial before returning the person to the

Title 7 VII, § 7059, 102 Stat. 4403 (1988) (codified at 18 U.S.C. App. § 9). Aside from these enumerated exceptions, though, Congress has stuck with the IAD's definition of the United States as a "state" on the same footing as other receiving states. See Mauro, 436 U.S. at 354; see also 18 U.S.C. App. § 2, art. II. Because Congress specifically amended the IAD to add these express exceptions, we can safely deduce that Congress did not intend to make any others. See Tenn. Valley Auth. v. Hill, 437 U.S. 153, 188 (1978) (concluding that under maxim expressio unius est exclusion alterius, enumerated exceptions are the only exceptions intended within the Endangered Species Act); see also Alabama v. Bozeman, 533 U.S. 146, 153 (2001) (concluding that "the language of the [IAD] militates against an implicit exception, for it is absolute").

Second, notwithstanding the United States' argument that the IAD's purpose compels deviation from its plain language, it is axiomatic that we must apply the statute as written. See Carchman v. Nash, 473 U.S. 716, 729 (1985) (rejecting an interpretation of the IAD that would elevate its purposes over its

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sending state, the "indictment, information or complaint" from the receiving state "shall" be dismissed with prejudice. 18 U.S.C. App. § 2, art. IV(e). In contrast, under § 9 of the IAD, "Special provisions when United States is a Receiving State," if the United States is the receiving sate, then the dismiss of the "indictment, information or complaint may be with or without prejudice." 18 U.S.C. App. § 9(1) (emphasis added). Section 9 does not indicate that the United States can disregard or override a sending state's denial of its request for temporary custody.

plain language); see also Bozeman, 533 U.S. at 153 (noting that in the IAD, as elsewhere, the word "shall" indicates a command). The IAD plainly mandates that a governor be allowed to reject a transfer request, so we must give effect to that command regardless of the statute's stated purpose.[8]

Indeed, in an earlier line of cases, we tried deviating from the IAD's language in order to comport with its purpose, but the Supreme Court abrogated the entire line. See United States v. Kelley, 402 F.3d 39, 42 (1st Cir. 2005) (stating that there can be "no exceptions to finding violations of the IAD for 'technical' or 'de minimis' missteps" and recognizing that Bozeman overruled our earlier contrary holdings); see also Bozeman, 533 U.S. at 152–56. Because the IAD provides that a sending-state governor may refuse to transfer a prisoner, and because Congress specifically excepted the United States from IAD provisions not including this one,

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[8] The IAD unambiguously states: "there shall be a period of 8 thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request." 18 U.S.C. App. § 2, art. IV(a). The United States argues that this thirty-day period has no practical import -- that a prisoner can readily be transferred within the thirty days whether the sending-state governor approves, acquiesces, or disapproves. We reject this interpretation, which would render the mandatory thirty-day period meaningless. See United States v. Ven-Fuel, Inc., 758 F.2d 741, 751–52 (1st Cir. 1985) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.").

the United States must honor a governor's denial of its request. It is, after all, a request, not an order or a mandate.

One last note remains to be sounded. The United States has argued that even if Article IV(a) governs ad prosequendum writs issued after invocation of the IAD, nevertheless disapproval of a written request under the IAD "may be premised only upon the requesting sovereign's failure to comply with IAD rules that are designed to safeguard the process and assure that the request is genuine." The United States insists that Governor Chafee's objection to the transfer of Pleau on grounds of Rhode Island's abhorrence of the death penalty is "not a valid basis" for refusing the request, and that allowing a governor to refuse an IAD request on public policy grounds "would be directly at odds with the IAD's goal of ensuring fast and orderly transfers." The United States cites no cases in support of this proposition, but rests its argument on the statutory text, which states that a requesting sovereign "shall be entitled to have a prisoner against whom he has lodged a detainer . . . made available." 18 U.S.C. App. § 2, art. IV(a) (emphasis added).

The United States' textual argument is unconvincing. It is true that Article IV(a) states that a requesting sovereign "shall be entitled" to have a prisoner made available to him after a detainer has been lodged. However, the United States neglects to mention that a few lines later, Article IV(a) explicitly qualifies this statement, and states that this is "provided . . . [t]hat there shall be a period of thirty days . . . within which period the Governor of the

sending State may disapprove the request for temporary custody or availability." 18 U.S.C. App. § 2, art. IV(a). See also Mauro, 436 U.S. at 363 n.28 (noting that the IAD retained a governor's right to refuse a transfer request on public policy grounds). It is uncontroversial that a governor may block a prisoner's transfer to a receiving state other than the United States, and we have already explained why Article IV(a) applies with equal force to the United States. As to the issue of timeliness, the IAD specifies a thirty-day time frame for a governor to decide whether or not to grant the request, and so long as a decision is rendered in that time frame, it is entirely unclear how it would matter to the speed of a transfer what reason a governor had for accepting or rejecting a transfer request.

The United States' attempt to circumvent the IAD with an ad prosequendum writ weighs in favor of our rejection of its claim for physical custody of Pleau. In RaShad v. Walsh, 300 F.3d 27 (1st Cir. 2002), we held that Massachusetts was negligent in failing to lodge a detainer with Texas after Massachusetts had indicted a Texas prisoner, even though the IAD does not explicitly require a receiving state to lodge a detainer with a sending state. Id. at 37. We reasoned that "[h]olding otherwise would allow a state to circumvent the IAD with impunity." Id. at 37–38. We also noted that there was no evidence Massachusetts deliberately tried to circumvent the IAD; therefore, the only import of Massachusetts's failure was to "cut[] in favor of the petitioner's speedy trial claim." Id. at 37. Here, the United States has gone much further. It has been seeking an ad prosequendum writ specifically in

order to dishonor Governor Chafee's denial of its request for custody, as was his right under the IAD. If Massachusetts's inadvertent disregard for the IAD hurt its case, the United States certainly cannot base its claim for custody of Pleau on a blatant attempt to sidestep the IAD – a federal law that the United States itself invoked when it filed a detainer with the state of Rhode Island. The logic of RaShad applies with even greater force where the state (i.e. the United States) in violation of the IAD is the one that invoked it in the first place by filing a detainer. To grant the United States custody of Pleau "would allow [the United States] to circumvent the IAD with impunity." Id. at 37–38.

For these reasons, we hold that once the federal government has elected to seek custody of a state prisoner under the IAD, it is bound by that decision. Any subsequent ad prosequendum writ is to be considered a written request for temporary custody under the IAD and, as such, subject to all of the strictures of the IAD, including the governor's right of refusal. The federal government is not required to seek custody under the IAD; it may elect to seek custody by means of a habeas writ. In that case, the Supremacy Clause requires states to conform to the habeas writ. But once the federal government has chosen to proceed under the auspices of the IAD, it may not seek to erase the memory of that decision by means of an ensuing habeas writ.[9]

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[9] The dissent implies that our result would effectively "empower[] a state governor to veto a federal court habeas writ," which Congress never intended to do. See Diss. Op. at 1.

Respectfully, this criticism misapprehends the scope of our holding. We do not hold that a state has a general right to disregard a properly granted ad prosequendum writ; such a broad holding would conflict with the Supremacy Clause and with the Supreme Court's statement in Mauro that "[t]he proviso of Art. IV(a) does not purport to augment the State's authority to dishonor [an ad prosequendum] writ." 436 U.S. at 363. Rather, we hold that in the circumstances present here, the United States gave up its right to seek an ad prosequendum writ. The question is not, as the dissent suggests, what Congress empowered the various states to do; rather, the question is what Congress bound the United States to do. By passing the IAD, Congress obligated the United States to choose either the IAD mechanism or the ad prosequendum mechanism and then accept the consequences of that choice. Thus, when the United States invoked the IAD to gain custody of Pleau, it lost its right to seek an ad prosequendum writ simply because it was dissatisfied with the result of the IAD process. Holding the United States to an agreement that was accepted by Congress neither violates the Supremacy Clause nor upsets the post-Civil War balance of power between the states and the federal government. Contra Diss. Op. at 35–36. Indeed, the federal government may "waive the federal sovereign's strict right to exclusive custody of a prisoner" in favor of state custody. Poland v. Stewart, 117 F.3d 1094, 1098 (9th Cir. 1997) (tracking the language of Ponzi, 258 U.S. at 260). Such a waiver is merely a specific manifestation of the general rule that the federal government may waive its sovereignty, either through executive acts, see, e.g., City of Newark v. United States, 254 F.2d 93, 95 n.1 (3rd Cir. 1958) (citing The Siren, 74 U.S. (7 Wall.) 152, 154 (1868), for the principle that "whenever the United States brings an action as plaintiff, it waives its sovereignty and assumes the status of a private individual for the purposes of counterclaim or defenses"), or legislative acts, see, e.g., United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992) (noting that the Federal Tort Claims Act creates "sweeping" waiver of federal sovereign immunity). The IAD creates a legislative waiver of federal sovereignty in the prisoner-custody context by defining the federal government as a state, subject to certain

## IV. Conclusion

As we have recently noted, prerogative writs such as mandamus and prohibition "are strong medicine and . . . should be dispensed sparingly." In re Sony BMG Music Entm't, 564 F.3d at 4. However, that should not be taken to imply that the writ "has fallen into desuetude." Horn, 29 F.3d at 770 n.20. Indeed, just two years ago, we issued an advisory writ enjoining a district court from broadcasting on the internet a non-evidentiary motions hearing in a copyright infringement case. See In re Sony BMG Music Entm't, 564 F.3d at 9–10. The novel and challenging issues presented in the present case are at least as important. In light of Governor Chafee's exercise of his right of refusal enshrined in Article IV(a) of the IAD, we issue a writ of prohibition instructing the parties that the June 30, 2011 writ of habeas corpus ad prosequendum is to be treated in every respect as a written request for temporary custody under the IAD, and that the United States is bound by the IAD's terms, including the governor's right to refuse a transfer request.[10]

**Petition granted.**

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exceptions. And to the extent a state acts in accordance with a federal law that includes a waiver of sovereignty, it can hardly be said to offend the Supremacy Clause.

[10] Pleau seeks an interlocutory appeal in addition to or 10 alternatively to the writ of prohibition. Because we issue the writ, we need not address Pleau's request for interlocutory review.

**-Dissenting Opinion Follows-**

**BOUDIN, Circuit Judge, dissenting**. Congress would surely be surprised to be told that it had empowered a state governor to veto a federal court habeas writ--designed to bring a federally indicted prisoner to federal court for trial on federal charges--because the governor opposed the penalty that might be imposed if a federal conviction resulted. Of course, Congress has not provided states with any such veto power, and the Supreme Court has already made this clear in United States v. Mauro, 436 U.S. 340 (1978).

A federal grand jury indicted Jason Pleau on December 14, 2010, charging him with federal felonies[11] related to the September 20, 2010, robbery and murder of a gas station manager making a bank deposit in Woonsocket, Rhode Island. Pleau was in Rhode Island state custody on parole violation charges when the indictment came down, and is now serving an 18–year sentence there for parole and probation violations.

To secure Pleau's presence in the federal prosecution, the federal government invoked the Interstate Agreement on Detainers Act ("IAD"). Pub. L. No. 91–358, 84 Stat. 1397 (1970) (codified as amended at 18 U.S.C. app. 2 § 2 (2006)). The IAD

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[11] Conspiracy to commit robbery affecting commerce, 18 U.S.C. 11 § 1951(a) (2006), robbery affecting commerce, id., and use of a firearm during and in relation to a crime of violence resulting in death, id. § 924(c)(1)(A), (j)(1).

provides what is supposed to be an efficient shortcut to achieve extradition of a state prisoner to stand trial in another state or, in the event of a federal request, to make unnecessary the prior custom of a federal habeas action to secure the state prisoner for a federal prosecution. See IAD art. I. In this instance, Rhode Island's governor refused the IAD request because of his stated opposition to capital punishment. United States v. Pleau, No. 10–184–1S, 2011 WL 2605301, at *2 n.1 (D.R.I. June 30, 2011).

The federal government then sought a writ of habeas corpus ad prosequendum from the district court to secure custody of Pleau--this being the traditional method by which a federal court obtained custody in such situations. E.g., Carbo v. United States, 364 U.S. 611, 615–16, 618 (1961). The federal habeas statute codifying this common law practice authorizes the writ to be issued by a federal court to secure a person, including one held in state custody, where "necessary to bring him into [federal] court to testify or for trial." 28 U.S.C. § 2241(c)(5) (2006). This habeas statute, currently in force, long predated the IAD, Carbo, 364 U.S. at 614–19.

Pursuant to the habeas statute, the federal district court in Rhode Island ordered Pleau to be delivered into federal custody. Pleau, 2011 WL 2605301, at *4. Pleau, who at that stage had no standing under existing precedent to challenge the writ,[12] nevertheless appealed and petitioned this

[12] E.g., Weekes v. Fleming, 301 F.3d 1175, 1180 n.4 (10th Cir. 2002), cert. denied, 537 U.S. 1146 (2003); Weathers v.

court for a writ of prohibition to bar the district court from enforcing the habeas writ. Over a dissent, the panel majority granted a stay of the habeas writ and Pleau remains today in state custody many months after the government first sought his appearance in federal court. Unless he is produced, he cannot be tried on the federal charges.

An expedited appeal followed in which the Rhode Island governor was granted belated intervention. The panel majority has now held that the state's refusal to grant consent under the IAD effectively disables as well the grant of the subsequently filed traditional habeas corpus ad prosequendum writ. This conclusion is remarkable both because Mauro held that lack of state consent would not affect the force of the habeas writ vis-à-vis the state and because it effectively thwarts a federal prosecution authorized by the United States Attorney and a federal grand jury.

Were the panel's position to prevail, Pleau could be permanently immune from federal prosecution. He is currently serving an 18–year term in Rhode Island prison and, if exempted now from answering the federal charges in the district court, could well agree to a life sentence under Rhode Island law for the robbery and murder. See Br. for Amicus

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Henderson, 480 F.2d 559, 559–60 (5th Cir. 1973) (per curiam); Derengowski v. U.S. Marshal, Minneapolis Office, Minn. Div., 377 F.2d 223, 223–24 (8th Cir.), cert. denied, 389 U.S. 884 (1967); United States v. Horton, No. 95–5880, 1997 WL 76063, at *3 (4th Cir. Feb. 24, 1997) (per curiam) (unpublished).

Curiae Governor Lincoln D. Chafee in Support of Pet'r Ex. A (letter from Pleau to Rhode Island Assistant Attorney General offering to plead to sentence of life without parole on state charges). Even if the term remains at 18 years, one could hardly count on necessary witnesses being available for federal prosecution two decades from now. Instead of a place of confinement, the state prison has been made a refuge against the federal courts.

To reach this result, the panel majority has circumvented standing limitations on the power of a defendant to challenge the writ, see note 12, above, as well as ordinary practice generally reserving prohibition and mandamus writs for clear error by the district court. E.g., In re City of Fall River, Mass., 470 F.3d 30, 32 (1st Cir. 2006). But, passing all that, on the core issue the panel decision adopts a reading of the federal statutes that disregards an explicit contrary determination by the Supreme Court in United States v. Mauro, 436 U.S. 340 (1978), on the relationship between the writ and the IAD.

Mauro disposed of two different federal appeals but, in the one most pertinent to Pleau, the background is easily summarized. The federal government lodged a detainer with state prison authorities, and then summoned the defendant from state prison to federal court by habeas writ, first for arraignment and (after many postponements) then for trial. The defendant repeatedly objected that he was being denied the speedy trial rights expressly protected by Article IV(c) of the IAD once its procedures have been invoked. 436 U.S. at 345–48.

After the defendant's federal conviction, the circuit court held that he had indeed been denied the speedy trial protections of the IAD, requiring dismissal of the federal indictment with prejudice. The Supreme Court agreed, saying that the detainer had triggered the IAD and the habeas writ comprised a "written request" for initiating a transfer contemplated by Article IV of the IAD. Mauro, 436 U.S. at 361–64. The fact that the writ had been used as part of the IAD process, the Court held, did not negate the IAD's express time limitations and sanction for ignoring them.

The Court went on, however, to expressly reject the suggestion that a state governor could resist a writ of habeas corpus by withholding consent to the transfer of a state prisoner to federal court. Indeed, the Court distinguished between the time limits of Article IV(c) triggered by the detainer and Article IV(a)'s reservation of the governor's power to withhold consent. The former represented Congress' [sic] concern about delays in the IAD procedure, which could adversely affect the defendant subject to the detainer, whether invoked by the federal government or a state.

By contrast, the latter reservation merely preserved for the holding state its traditional authority to refuse an extradition request from another state, Mauro, 436 U.S. at 363 & n.28; it did not curtail whatever authority the writ traditionally gave the federal court to insist on the production of a defendant contrary to the wishes of the state. In fact, in Mauro the federal government had argued that applying the time limits to it could allow a governor

to invoke Article IV's consent provision to a federal writ used after a detainer had been filed. The Court answered:

> We are unimpressed. The proviso of Art. IV(a) does not purport to augment the State's authority to dishonor such a writ. As the history of the provision makes clear, it was meant to do no more than preserve previously existing rights of the sending States, not to expand them. If a State has never had authority to dishonor an ad prosequendum writ issued by a federal court, then this provision could not be read as providing such authority.

Id. at 363 (internal footnote omitted).

That "a state has never had authority to dishonor an ad prosequendum writ issued by a federal court" is patent. The habeas writ has been codified by Congress, and under the Supremacy Clause, U.S. Const. art. VI, cl. 2, Congress' [sic] power trumps any contrary position or preference of the state. This principle has been regularly and famously used to compel states, including their governors, to respect orders of federal courts in civil rights cases such as Cooper v. Aaron, 358 U.S. 1, 18–19 (1958), and United States v. Barnett, 376 U.S. 681 (1964).[13] State interposition to defeat federal

[13] And this fundamental tenet of constitutional law is, of course, not confined to the civil rights context. E.g., Puerto Rico

authority is a doctrine that was thought to have vanished with the Civil War. E.g., Gonzales v. Raich, 545 U.S. 1, 29 (2005).

That the federal statutory habeas ad prosequendum writ overrides any state power to withhold the defendant has been affirmed by three circuits with which the panel majority now conflicts. United States v. Graham, 622 F.2d 57, 59 (3d Cir.), cert. denied, 449 U.S. 904 (1980); United States v. Bryant, 612 F.2d 799, 802 (4th Cir. 1979), cert. denied, 446 U.S. 919 (1980); Tranfy v. United States, 311 F. App'x 92, 95–96 (10th Cir. 2009) (unpublished). A Second Circuit dictum, United States v. Scheer, 729 F.2d 164, 170 (2d Cir. 1984), to the extent it suggests otherwise, was properly criticized as a misreading of Mauro. Id. at 172 (Kearse, J., concurring).

Mauro did not hold, as the panel majority supposes, that the filing of a detainer with state authorities disempowers the habeas writ or gives the governor a veto over its use; the Court, in the indented passage quoted above, said exactly the opposite. Nor do general canons of construction allow a lower court panel majority to disregard the Supreme Court's own construction of the IAD, namely, that "[t]he proviso of Art. IV(a) does not purport to augment the State's authority to dishonor

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v. Branstad, 483 U.S. 219, 227–29 (1987); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695–96 (1979); Sterling v. Constantin, 287 U.S. 378, 397–98 (1932); Ex Parte Young, 209 U.S. 123, 167–68 (1908).

such a writ." 436 U.S. at 363.

Here, a valid writ has been approved by a federal district court but is now effectively dishonored by the state and by the panel majority's writ of prohibition declaring that the governor is entitled to disregard the writ. Mauro is plainly to the contrary, and the panel majority's action cannot survive the inevitable further review now fated for it.

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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| United States of America | ) | |
| v. | ) | Cr. No. 10–184–1 S |
| Jason W. Pleau, Defendant. | ) | |

**OPINION and ORDER**

WILLIAM E. SMITH, United States District Judge.

The United States has petitioned the Court for a writ of habeas corpus ad prosequendum for the person of Defendant Jason W. Pleau, and Defendant Pleau has filed a motion for miscellaneous relief, asking the Court not to issue the writ.

I. Background

The charges against Pleau arise from the September 20, 2010 murder of David Main outside of a bank in Woonsocket, Rhode Island. Pleau is currently incarcerated at the Rhode Island Adult Correctional Institutions (ACI), where he is serving state sentences for a parole violation and the violation of a suspended sentence.

On November 18, 2010, the United States filed a criminal complaint against Pleau in this Court, and that same day, a magistrate judge issued a warrant

for his arrest. Shortly thereafter, the United States Marshal Service lodged a detainer against Pleau with the ACI. On December 14, 2010, a federal grand jury indicted Pleau for conspiracy to commit robbery affecting commerce, in violation of 18 U.S.C. § 1951(a) (the Hobbs Act); robbery affecting commerce, in violation of 18 U.S.C. § 1951(a); and possessing, using, carrying, and discharging a firearm in relation to a crime of violence with death resulting, in violation of 18 U.S.C. §§ 924(c)(1)(A) & (j)(1). On May 10, 2010, the Court issued a second warrant for Pleau's arrest; this warrant was returned unexecuted two weeks later.

On May 25, 2010, at the request of the United States, the Court entered an order transmitting the United States's request for temporary custody of Pleau under the Interstate Agreement on Detainers Act (IADA or Agreement). In essence, the United States requested temporary custody of Pleau so that he could stand trial in federal court on the charges alleged in the Indictment.

Some background on the IADA is necessary to appreciate the events which followed. Congress enacted the IADA in 1970, joining the United States and the District of Columbia with the 46 enacting states under the Agreement, in order to "encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." 18 U.S.C. App. 2 § 2, art. I; see also United States v. Mauro, 436 U.S. 340, 343 (1978).

Article IV of the Agreement provides that a prosecutor is entitled to have a prisoner made available in accordance with Article V of the Agreement, upon the prosecutor's "written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated." The United States is considered a "State" under the Agreement. 18 U.S.C.App. 2 § 2, art. II(a); see also Mauro, 436 U.S. at 354 ("[T]he United States is a party to the Agreement as both a sending and a receiving State."). Under the Agreement, a "Sending State" is defined as "a State in which a prisoner is incarcerated at the time . . . that a request for custody or availability is initiated [under the Agreement]," and a "Receiving State" is a "State in which trial is to be had on an indictment, information, or complaint pursuant to [the Agreement]." 18 U.S.C. App. 2 § 2, art. II(b), (c). Article IV(a) further provides that,

> there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

Id.

On June 23, 2011, the Governor of Rhode Island, Lincoln D. Chafee, sent a letter to the United States denying its request for Pleau's temporary

custody under the IADA. (See Ex. A to Def.'s Mot., Letter from Lincoln D. Chafee to Peter Neronha, U.S. Attorney, June 23, 2011.)[1] Four days later, on June 27, 2011, the United States and Pleau filed the petition and motion, respectively, now before the Court.

II. Discussion

In its petition for a writ of habeas corpus ad prosequendum, the United States requests Pleau's presence for his arraignment in this Court and the consequent prosecution under the Indictment. The United States contends that the Governor's dishonoring of its request under the IADA does not affect the issuance of the writ and that Pleau does not have standing to contest the Court's issuance of a writ of habeas corpus ad prosequendum.

A. Standing

Under 28 U.S.C. § 2241(c)(5), a federal court may issue a writ of habeas corpus ad prosequendum to secure temporary custody of a state prisoner for the prisoner's federal prosecution. Flick v. Blevins,

[1] According to news accounts, the Governor's decision to deny the request for temporary custody was a statement against capital punishment, which the United States may seek in this case. See Katie Mulvaney, Will federal death penalty come into play in case of Woonsocket killing?, Providence Journal, June 25, 2011, available at http://www.projo.com/news/content/PLEAU_FOLLOW_06-25-11_JSOR13F_v15.43142.html (last accessed June 29, 2011).

887 F.2d 778, 781 (7th Cir. 1989).[2] "Upon receipt of such a writ, state authorities deliver the prisoner in accordance with its terms and in compliance with § 2241." United States v. Kenaan, 557 F.2d 912, 916 (1st Cir. 1977).

Numerous federal courts have held that it is axiomatic that "a state prisoner is without standing to contest a federal court's issuance of a writ of habeas corpus ad prosequendum." Derengowski v. United States Marshal, 377 F.2d 223, 223 (8th Cir. 1967) (emphasis in original); see also Ponzi v. Fessenden, 258 U.S. 254, 260 (1922); United States v. Harden, 45 Fed. Appx. 237, 239 (4th Cir. 2002); United States v. Horton, No. 95–5880, 1997 WL 76063, at *3 (4th Cir. Feb. 24, 1997) (mem.).

In an attempt to refute this well-established proposition, Pleau points to the Supreme Court's recent decision in Bond v. United States, No. 09–1227, 2011 WL 2369334 (U.S. June 16, 2011). In Bond, the Supreme Court held that a defendant has standing to bring a constitutional challenge on federalism grounds against a statute under which he was indicted. Id. at *3. Pleau, however, challenges the issuance of the writ; he does not challenge the statute authorizing a federal court to issue a writ of habeas corpus ad prosequendum, nor any statute under which he has been indicted. Under these circumstances, Bond is inapposite, and Pleau clearly lacks standing to challenge this Court's issuance of

[2] For a discussion of the distinction between a writ of habeas corpus ad prosequendum and a detainer under the IADA, see United States v. Mauro, 436 U.S. 340, 358–59 (1978).

the writ. See Derengowski, 377 F.2d at 223.

B. The Writ of Habeas Corpus Ad Prosequendum

It appears that this is the first time a governor has dishonored a request by the United States under the IADA for temporary custody of a state prisoner. For this reason, although Pleau does not have standing to challenge the Court's issuance of the writ, both the federalism principles implicated by these novel circumstances and the practical consequences arising from them warrant some further discussion.

The Supreme Court has made plain that once a detainer is lodged against a state prisoner, the subsequent issuance of a writ of habeas corpus ad prosequendum does not relieve the United States of its duty to provide the prisoner with the procedural safeguards set forth in the IADA.[3] Mauro, 436 U.S. at 362; see also Bloomgarden v. Bureau of Prisons, No. 09–56670, 2011 WL 1301541, at *2 (9th Cir. Apr. 6, 2011) ("[I]t must be conceded that: . . . a detainer, once filed, brings the Act into play whereas a writ of habeas corpus ad prosequendum, standing alone, would not." (quoting United States v. Schrum, 504 F.

[3] Pleau argues that United States v. Scheer, 729 F.2d 164, 170 (2d Cir. 1984), stands for the proposition that the issuance of a writ of habeas corpus ad prosequendum cannot override the 30–day waiting period provided for in the IADA, where the United States has previously invoked the IADA. Here, however, because the United States petitions the Court for a writ after the 30–day waiting period as elapsed, the Court need not decide the issue.

Supp. 23, 25 (D. Kan. 1980))). In short, the issuance of an ad prosequendum writ does not nullify the invocation of the IADA and its concomitant procedural protections.[4]

But while the invocation of the IADA serves to extend procedural protections to a prisoner transferred from state to federal custody, it does not turn well-grounded and immutable principles of federalism and federal supremacy on their head. That is, the proviso in Article IV allowing a governor 30 days to refuse a request for temporary custody under the IADA does not, and could not, confer upon a governor the authority to dishonor a federal court's writ of habeas corpus ad prosequendum.

The Supremacy Clause of the federal Constitution states that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. The federal statute authorizing a federal court to issue an ad prosequendum writ grants federal habeas jurisdiction when "[i]t is necessary to bring [a prisoner] into [federal] court to testify or for trial," 28 U.S.C. § 2241(c)(5). This grant of authority can be traced back to Chief Justice Marshall's explication of the writs available to federal courts in Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 98 (1807), in which the Supreme Court recognized the power of a federal court to issue a writ of habeas

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[4] Indeed, the United States concedes in its petition that "the speedy trial provisions of Article IV(c) of the [IADA] and the anti-shuttling provisions of Article IV(e) of the [IADA] will apply to [Pleau]." (U.S. Pet. For Writ 3.)

corpus ad prosequendum "when it is necessary to remove a prisoner, in order to prosecute" him.

Article IV's proviso was intended "to do no more than preserve previously existing rights of the sending States, not to expand them. If a State has never had authority [under the Supremacy Clause] to dishonor an ad prosequendum writ issued by a federal court, then this provision could not be read as providing such authority." Mauro, 436 U.S. at 363. Not only does the legislative history of the IADA suggest that the Agreement merely preserved a governor's pre-existing authority to dishonor the request for temporary custody by another IADA State, see id. at 363 n.28 (citing H.R. Rep. No. 91–1018, p. 2 (1970); S. Rep. No. 91–1356, p. 2 (1970)), but also there can be no question that a State's dishonoring of a federal writ violates the Supremacy Clause. See Kenaan, 557 F.2d at 916 n.8 (noting that no state has refused to honor a writ under § 2241(c)(a), but that "[in] the unlikely event of such a confrontation, we are confident that the writ would be held [enforceable]"). The Court therefore concludes that where the IADA has been invoked and a detainer lodged against a state prisoner, Article IV may afford the governor of the sending State the right to dishonor the request to transfer (as occurred here) but, in all events does not empower him, or his agents, to disobey a federal court's writ of habeas corpus ad prosequendum as to that prisoner.

III. Conclusion

Pursuant to 28 U.S.C. § 2241(c)(5), it is hereby ordered that the United States's petition for writ of

habeas corpus ad prosequendum for the person of Jason W. Pleau be granted and that the Clerk of the Court issue a writ of habeas corpus ad prosequendum in accordance with the United States's petition; Defendant's motion for miscellaneous relief is denied.

IT IS SO ORDERED.

***/s/ William E. Smith***
William E. Smith
United States District Judge
Date: June 30, 2011

**United States Court of Appeals**
**For the First Circuit**

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No. 11–1775

UNITED STATES OF AMERICA,

Appellee,

v.

JASON W. PLEAU

Defendant, Appellant.

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LINCOLN D. CHAFEE, in his capacity as Governor of the State of Rhode Island,

Intervenor.

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No. 11–1782

IN RE: JASON WAYNE PLEAU,

Petitioner.

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LINCOLN D. CHAFEE, in his capacity as Governor of the State of Rhode Island,

Intervenor.

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Before

Lynch, Chief Judge,
Torruella, Boudin, Howard and Thompson,
Circuit Judges.

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**ORDER OF COURT**
**Entered: May 21, 2012**

Our decision in this case was released on May 7, 2012. The Clerk's Office advises that, in the ordinary course, the mandate would issue on May 29, 2012.[1] The government has moved to expedite issuance of the mandate; defendant-appellant Pleau and intervenor Governor Chafee have moved for a stay pending certiorari. Although the government has legitimate reasons for its motion, the date for issuance will remain May 29, 2012; but we see no basis for delaying issuance beyond that date.

A petition for rehearing would plainly be fruitless since the matter has now been twice fully briefed and the issues in both rounds were the same. As for any request for a stay of mandate pending certiorari, the customary criteria are not met: even assuming a certiorari petition would present a non-frivolous question, there is no "good cause" for a stay, see Fed. R. App. P. 41(d)(2)(A), and there is a

[1] The procedural posture is unusual because the case was reheard by the court en banc, and the underlying proceedings comprised both an original request to this court for a writ of prohibition and an appeal from a district court order of debatable finality.

reasonable risk that the federal prosecution of Pleau will be prejudiced by any further delay in the proceedings.

The federal offenses of which Pleau is accused occurred on September 14, 2010. Although the charged crimes occurred almost two years ago, and the indictment followed less than three months later, Pleau has not yet even been arraigned in federal district court because Rhode Island, which holds Pleau as a state prisoner, has refused to deliver Pleau into federal custody to answer the federal charges. The district judge ultimately issued a writ of habeas corpus expressly authorized by federal statute requiring that Pleau be brought to federal court, 28 U.S.C. § 2241(c)(5), but that writ was in turn stayed by a majority of the original panel as a result of appellate proceedings described in our decision.

Whether a non-frivolous issue could be presented by a certiorari petition might be debated. As the en banc majority decision reads United States v. Mauro, 436 U.S. 340 (1978), the state's ability to resist the writ depends entirely on a question to which the Supremacy Clause provides a plain negative answer, id. at 363, and no previous governor appears to have defied the writ in like circumstances. On the other hand, two dissenting members of the en banc court dispute the majority's reading of Mauro.

However, as to "good cause," Pleau's arraignment and initial proceedings looking toward

an eventual trial should move forward immediately.[2] As time passes, necessary witnesses and other evidence may be lost, and Congress has underscored the strong public interest in the expeditious commencement of criminal trials. 18 U.S.C. §§ 3161 et seq. Indeed, the government says in its opposition that at least one of the witnesses is elderly, and others "live in marginal circumstances"; it also points out that the case against Pleau's co-defendant (Santiago) has effectively been put on hold pending resolution of Pleau's custody issues, and if the stay is granted the government may have to move forward with the case against Santiago, possibly resulting in the inefficiency and expense of two major trials.

No threat exists of irreversible prejudice to Pleau or Rhode Island. A trial of Pleau is unlikely to occur before the Supreme Court could consider a certiorari petition, and were certiorari granted the Court could itself grant a stay of proceedings. Anyway, even if a trial occurred and Pleau and Chafee thereafter prevailed on their position, objections based on the detainer statute would not be mooted, see Mauro, 436 U.S. at 347–48, 365, and Pleau could be returned promptly to state custody.

Accordingly, the motion to expedite issuance of the mandate is denied insofar as it may seek issuance

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[2] Proceedings could be protracted in a case such as this one when the Attorney General is required to decide whether to seek the death penalty. See United States v. Lopez-Matias, 522 F.3d 150, 155 (1st Cir. 2008).

prior to May 29, 2012; but, for the reasons stated, a stay of mandate beyond that date is denied.

**TORRUELLA, Circuit Judge, with whom THOMPSON, Circuit Judge, joins, dissenting.** I respectfully dissent from the denial of the motion to stay the issuance of the mandate in this case. Federal Rule of Appellate Procedure 41(d)(2)(A) permits this Court to stay a mandate pending the filing of a petition for certiorari if the petition would "present a substantial question" and if there is "good cause for a stay." The inquiry contemplated by this rule "focuses on whether the applicant has a reasonable probability of succeeding on the merits and whether the applicant will suffer irreparable injury." McBride v. CSX Transp., Inc., 611 F.3d 316, 317 (7th Cir. 2010) (internal quotation marks omitted). See also 20A James W. Moore et. al., Moore's Federal Practice, § 341.14[2] (Matthew Bender 3d ed. 2012). Both of these requirements are clearly satisfied here.

"To demonstrate a reasonable probability of success on the merits, the applicant must show a reasonable probability that four Justices will vote to grant certiorari and a reasonable possibility that five Justices will vote to reverse the judgment of [the Court of Appeals]." McBride, 611 F.3d at 317. Under Supreme Court Rule 10(a), the Court will consider granting certiorari if a court of appeals "has entered a decision in conflict with another United States court of appeals on the same important matter." In addition, under Supreme Court Rule 10(c), the Court will consider granting certiorari when a federal Court of Appeals "has decided an important question of

federal law that has not been, but should be, settled by [the] Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the] Court." Here, these factors weigh in favor of a grant of certiorari.

There can be no doubt that this case presents an "important question of federal law": the proper balance of power between the states and the federal government in the context of custody over prisoners. Questions of federalism and the interaction between federal government and state government authority are some of the most important legal issues that the Supreme Court must resolve. The potential impact of this case on the rights of states is significant enough that the National Governors Association and the Council of State Governments, organizations representing the governors and elected and appointed officials of all 50 states, participated in this case as amici curiae. This case also has important implications for the rights of criminal defendants, as evidenced by the appearance as amici curiae of various organizations representing criminal defense lawyers.

Resolution of this question of federal law turns in large part on the proper interpretation of a Supreme Court case, United States v. Mauro, 436 U.S. 340 (1978). A dispute regarding the proper interpretation of a Supreme Court case is clearly one that is best settled by the Supreme Court. In addition, as explained by the dissent from the en banc decision, it can be argued that the en banc decision conflicts with Mauro, a relevant decision of the Supreme Court. See United States v. Pleau, No.

11–1775, slip op. at 15 (1st Cir. May 7, 2012) (Torruella, J., dissenting). Moreover, there is a split of authority among the circuits regarding the proper reading of Mauro. Compare United States v. Trafny, 311 F. App'x. 92, 95–96 (10th Cir. 2009), United States v. Graham, 622 F.2d 57, 59–60 (3d Cir. 1980), cert. denied, 449 U.S. 904 (1980), and United States v. Bryant, 612 F.2d 799, 802 (4th Cir. 1979), with United States v. Scheer, 729 F.2d 164, 170 (2d Cir. 1984).

Furthermore, if the Court does grant certiorari, there is a reasonable possibility that five Justices will vote to overturn the en banc majority's decision. Reasonable jurists can disagree regarding the proper interpretation of Mauro, as illustrated both by the debate within this Court and by the split in authority between the Circuits. It is by no means certain that the Supreme Court would agree with the en banc majority's decision.

There is also good cause to delay the issuance of the mandate. The majority argues that the mandate must be issued according to the normal schedule because the federal prosecution of Pleau must be allowed to resume as soon as possible. However, it is difficult to see what will be lost by allowing the Supreme Court time to decide whether or not to grant certiorari in this case. On the other hand, Rhode Island's interests could be irreparably harmed by Pleau's transfer to federal custody.

The State of Rhode Island has a public policy against the death penalty. In furtherance of this public policy, the State has an interest in preventing

its citizens from being exposed to a prosecution that might result in the death penalty. Rhode Island also has an interest in upholding its sovereign right to refuse a request for a prisoner transfer, a right guaranteed by the express language of the Interstate Agreement on Detainers. Both of these interests could be irreparably harmed if Pleau is transferred before the Supreme Court has an opportunity to decide whether or not to grant certiorari. The transfer of Pleau to federal custody could moot this case entirely. In addition, as the en banc majority opinion recognized, "the governor could hardly obtain meaningful relief following a federal conviction of Pleau." Pleau, slip op. at 6.

Given the importance of the issues presented in this case and the risk of irreparable harm to Rhode Island's interests, I see no reason for the majority's haste to issue the mandate. The Supreme Court may yet decide to uphold the en banc majority's opinion, but it may also decide to reinstate the original panel's decision. The most prudent course of action for this Court seems to be to leave the status quo in place while the Supreme Court decides what it wants to do. Therefore, I respectfully dissent.

By the Court:

/s/ Margaret Carter, Clerk.

cc: Hon. William E. Smith, Mr. David DiMarzio, Clerk, United States District Court for the District of Rhode Island, Mr. Goldstein, Ms. Richards, Mr. Hoose, Mr. Lockhart, Mr. Mann. Mr. Behr, Mr.

Cavanaugh, Mr. Fabisch, Mr. Haskell, Mr. Marx, Mr. Mirenda & Mr. Ferland.

**United States Court of Appeals**
**For the First Circuit**

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No. 11–1775

UNITED STATES

Appellee

v.

JASON WAYNE PLEAU

Defendant - Appellant

LINCOLN D. CHAFEE, in his capacity as

Governor of the State of Rhode Island

Intervenor

---

No. 11–1782

In re: JASON WAYNE PLEAU

Petitioner

---

LINCOLN CHAFEE, Governor of Rhode Island

Intervenor

---

Before

Lynch, Chief Judge
Torruella, Boudin, Lipez, Howard, and Thompson
Circuit Judges.

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ORDER OF COURT

Entered: December 21, 2011

A majority of the active judges having voted to rehear this case en banc, the petition for Case: 11-1775 Document: 00116307877 Page: 1 Date Filed: 12/21/2011 Entry ID: 5604763 rehearing en banc is granted. In accordance with customary practice, the panel opinion and the dissent released on October 13, 2011, are withdrawn, and the judgments entered on the same date are vacated. See 1st Cir. I.O.P. X(D). The stay of district court proceedings granted by the panel remains in effect pending further order of the en banc court.

The parties have filed briefs and the en banc court will have copies of these briefs. However, the parties are invited to file supplemental briefs, not to exceed 20 pages per side. Such briefs should be filed simultaneously on or before **January 26, 2012**. Amici are welcome to file amicus briefs, also not to exceed 20 pages per brief, on the same schedule, but must seek leave of court.

Supplemental briefs by the parties and amicus briefs must comply with applicable rules concerning format, number of copies, service and other requirements. The en banc hearing will be scheduled

for **April 4, 2012, at 9:00 a.m.**

It is so ordered.

By the Court:

/s/ Margaret Carter, Clerk.

cc:
Honorable William E. Smith, District Court Judge
David DiMarzio, Clerk of Court, United States District Court for the District of Rhode Island
William J. Ferland
Adi Goldstein
Donald Campbell Lockhart
David P. Hoose
Robert Barney Mann
Claire J.V. Richards

**CONSTITUTION OF THE UNITED STATES**

**ARTICLE I, SECTION 10, CLAUSE 3**

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

**United States Code**

**Title 18. Crimes and Criminal Procedure**

**Appendix 2. Interstate Agreement on Detainers**

**§ 1. Short title**

This Act may be cited as the "Interstate Agreement on Detainers Act".

**§ 2. Enactment into law of Interstate Agreement on Detainers**

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The

party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of

which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: Provided, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also

inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after

completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: And provided further, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the

sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not

affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"Article V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his

authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant

with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the

departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"Article VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"Article VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"Article VIII

"This agreement shall enter into full force and effect as to party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute

repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"Article IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

**§ 3. Definition of term "Governor" for purposes of United States and District of Columbia**

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia.

**§ 4. Definition of term "appropriate court"**

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

**§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia**

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

**§ 6. Regulations, forms, and instructions**

For the United States, the Attorney General, and for the District of Columbia, the Mayor of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

**§ 7. Reservation of right to alter, amend, or repeal**

The right to alter, amend, or repeal this Act is expressly reserved.

**§ 8. Effective Date**

This Act shall take effect on the ninetieth day after the date of its enactment.

**§ 9. Special Provisions when United States is a Receiving State**

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State—

> (1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice; and
>
> (2) it shall not be a violation of the agreement on detainers if prior to trial the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing.

**United States Code**

**Title 28. Judiciary and Judicial Procedure**

**Part VI. Particular Proceedings**

**Chapter 153. Habeas Corpus**

**§ 2241. Power to grant writ**

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien

detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

**DETAINER**

**AGAINST SENTENCED STATE PRISONER BASED ON FEDERAL ARREST WARRANT**

United States Marshal

*(District)*

P.O. BOX 1524
PROVIDENCE, RI 02901
*(Return Address and Phone)*

*Please type or print neatly.*

| | | | |
|---|---|---|---|
| TO: | ADULT CORRECTIONAL INSTITUTE<br>ATTN: RECORDS & IDENTIFICATION | DATE: | 11/18/2010 |
| | | SUBJECT: | PLEAU, JASON W. |
| | | AKA: | |
| | | DOB/SSN: | 1977 |
| | | REF.# | ID 103893 |
| | | USMS#: | |
| | | CR#: | 1:10-MJ-275M |

Please accept this Detainer against the above-named subject who is currently in your custody. The United States District Court for the _____ District of RHODE ISLAND has issued an arrest warrant(s) charging the subject with the commission of the following offense(s):

Conspiracy to commit robbery affecting commerce
Robbery affecting commerce
Using and carrying a firearm during and in relation to a crime of violence thereby causing the death of a person, which killing is murder

Prior to the subject's release from your custody, please notify this office at once so that we may assume custody if necessary. If the subject is transferred from your custody to another detention facility, we request that you forward our Detainer to said facility at the time of transfer and advise this office as soon as possible.

The notice and speedy trial requirements of the Interstate Agreement on Detainers Act APPLY to this Detainer because the Detainer is based on pending Federal criminal charges which have not yet been tried. Pursuant to the provisions of the Interstate Agreement on Detainers Act (IADA), a person serving a sentence of imprisonment in any penal institution against whom a detainer is lodged (based on pending Federal criminal charges which have not yet been tried) must be advised that a Detainer has been filed and that the prisoner has the right to demand speedy trial on those charges. Accordingly, please advise the subject that a Detainer has been filed against him/her and that under the IADA, he/she has the right to demand speedy trial on the charges. If your office does not have an official form for such purposes, the statements contained in this Form below may be used.

INSTRUCTIONS FOR COMPLETION OF STATEMENTS

1. Please read or show the following to the subject:

"You are hereby advised that a Detainer has been filed against you on (date) 11/18/2010, on the basis of Federal criminal charges filed against you in the U.S. District Court for the _____ District of RHODE ISLAND. With regard to answering these charges, you are hereby advised that you have the right to demand a speedy trial under the Interstate Agreement on Detainers Act (IADA). Under the IADA, you have the right to be brought to trial within 180 days after you have caused to be delivered to the appropriate U.S. Attorney and the appropriate U.S. District Court, written notice of your request for a final disposition of the charges against you. Because the 180-day time limit may be tolled by virtue of delays attributable to you, you should periodically inquire as to whether your written notice of request for a final disposition of the charges against you has been received by the appropriate U.S. Attorney and the appropriate U.S. District Court. You are hereby advised that the 180-day time limit does not commence until your written notice of request for final disposition of the charges against you has actually been delivered to the appropriate U.S. Attorney and the appropriate U.S. District Court.

If you have any questions regarding the provisions of the IADA, you should contact your attorney or the U.S. Attorney for the _____ District of RHODE ISLAND.

2. Please execute the following:

The foregoing was read to or by subject and a copy of the Detainer was delivered to him on 11/22/10.

Signed: /s/ C.O. R. Renshaw Title: Corrections Officer

3. Please have the prisoner execute the following:

"I have read or have been read the above paragraph notifying me that a Detainer has been lodged against me and that I have the right to demand speedy trial on the charge(s). I (do) (do not) demand a speedy trial on the charges. I understand that if I do request a speedy trial, this request will be delivered to the Office of the United States Attorney who caused the Detainer to be filed. I also understand that my right to a speedy trial under the IADA is the right to be brought to trial within 180 days after my written notice of request for a final disposition of the charges against me has actually been delivered to the appropriate U.S. Attorney and the appropriate U.S. District Court. I further understand that the 180-day time limit may be tolled by any delays attributable to me, and that I must periodically inquire as to whether my written notice of request for a final disposition of the charges against me has been received by the appropriate U.S. Attorney and appropriate U.S. District Court. Finally, I understand that if at any time hereafter I desire to demand speedy trial and have not already done so, I can inform my custodian who will then cause the

request to be forwarded to the appropriate U.S. Attorney."

| | |
|---|---|
| /s/ Robert L. Renshaw, Jr. | Refused to Sign |
| *(Witness)* | *(Signature of Prisoner and Date)* |
| | JASON WAYNE PLEAU |
| | *(Typed or Printed Name of Prisoner)* |

4. Please acknowledge receipt of this detainer. In addition, please provide one copy of the Detainer to the prisoner, return one copy of the Detainer to this office in the enclosed self-addressed envelope, and, if the prisoner demands a speedy trial, forward the Detainer together with the Certificate of Inmate Status by registered or certified mail to the U.S. Attorney for the _____ District of RHODE ISLAND and the U.S. District Court for the _____ District of RHODE ISLAND.

5. If the prisoner does not demand a speedy trial at this time and further elects to demand a speedy trial on the charge(s) at a later date, you should obtain a new set of this Form USM-17 from the United States Marshal, have the prisoner complete the amended form, and follow the instructions contained in paragraph 4 above.

Your cooperation is greatly appreciated.

RECEIPT

Very truly yours

Date: _____

/s/Laura Lundan for

Signed: _____ Signature

By: _____

STEVEN G. O'DONNELL

Title: _____ U.S. Marshal

**RHODE ISLAND PUBLIC DEFENDER**
160 Pine Street, Providence, Rhode Island 02903
TELEPHONE: (401) 222-3492 FAX: (401) 222-3287
EMAIL: info@ripd.org WEBSITE: www.ripd.org

May 17, 2011

Randall White, Esq.
Assistant Attorney General
150 South Main Street
Providence, RI 02903

Dear Mr. White:

I had the opportunity to speak with Jason Pleau since you and I last communicated about this case. He has authorized me to tell you that it is his desire to plea to the allegations in State court and he is willing to take a Life Without Parole sentence.

Sincerely,

/s/ John

John J. Hardiman
Public Defender

JJH:jgt

CC: Scott Erikson
Assistant Attorney General

Robert Mann, Esq.

**FORM V**

**INTERSTATE AGREEMENT ON DETAINERS**

**REQUEST FOR TEMPORARY CUSTODY**

| | | |
|---|---|---|
| TO: | Captain Frederick Haibon | Intake Service Center. RI DOC |
| | (Warden) | (Institution) |
| | 18 Slate Hill Road | Cranston, Rhode Island |
| | (Address) | (City/State) |

Please be advised that Jason W. Pleau, Inmate No. 103893, who is presently an inmate of your institution, is under Indictment (C.R. No. 10-184-S) in the District of Rhode Island of Which I am the Deputy Chief Criminal Division.

Said inmate is therein charged with the following offense(s):

1. Conspiracy to Commit Robbery Affecting Commerce, in violation of 18 U.S.C. § 1951(a);

2. Robbery Affecting Commerce, in violation of 18 U.S.C. §§ 2, 1951(a); and

3. Possessing, Using, Carrying, and Discharging a Firearm in Relation to a Crime of Violence, in violation of 18 U.S.C. §§ 2, 924(c)(1)(A) and (j)(l).

In order that proceedings in this matter may be properly had, I hereby request temporary custody of such person pursuant to Article IV(a) of the Interstate Agreement on Detainers (IAD).

I propose to bring this person to trial on the above Indictment (C.R. No. 10-184-S) within the time specified in Article IV(c) of the IAD.

Attached herewith find a certified copy of:

A. The Indictment
B. The Warrant
C. Fingerprint cards, photographs, and physical description (if available).

I hereby agree that immediately after trial is completed in this jurisdiction I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer, immediately after trial and to return it to your state with the inmate.

Signature: /s/ Adi Goldstein
ADI
GOLDSTEIN
Deputy Chief
Criminal
Division
United States
Attorney's
Office

Dated: 5/19/2011

Address: 50 Kennedy Plaza, 8th Floor

City/State: Providence, RI 02903 Telephone: (401) 709-5050

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the IAD.

So Ordered:

/s/ W. Smith
WILLIAM E. SMITH, DISTRICT COURT JUDGE

5/22/11
Date

Court/Judicial District: U.S. District Court for the District of R.I.
City/State: Providence, RI
Telephone: (401) 752-7120

Instructions: Six copies. Signed copies must be sent to the inmate and to the official who has the inmate in custody. A copy should be sent to the Agreement Administrators of both the sending and the receiving state. Copies should be retained by the person filing the request and the judge who signs the request. Prior to transfer the inmate may be afforded a

judicial hearing similar to that provided under the Uniform Criminal Extradition Act in which the inmate may bring a limited challenge to this request.

**State of Rhode Island and Providence Plantations**

**Lincoln D. Chafee**
**Governor**

June 23, 2011

Peter Neronha
United States Attorney for the District of Rhode Island
50 Kennedy Plaza, 8th Floor
Providence, RI 02903

Dear Mr. Neronha:

I am in receipt of Assistant United States Attorney Adi Goldstein's request for temporary federal custody of Jason Wayne Pleau under the Interstate Agreement on Detainers, dated May 24, 2011. Pursuant to R.I. Gen. Laws § 13-13-2, Article IV(a) and 18 U.S.C. App. 2, § 2, Article IV(a), the governor of the sending state has 30 days from the date of receipt of the written request for custody in which to disapprove the request. As the governor of the sending state in this instance, I hereby exercise that authority and disapprove your office's written request for temporary custody of Mr. Pleau,

Sincerely,

/s/Lincoln D. Chafee
Lincoln D. Chafee

cc: Adi Goldstein, Assistant United States Attorney
William J. Ferland, Assistant United States Attorney
Robert B. Mann, Esq.
David P. Hoose, Esq.
Peter F. Kilmartin, Attorney General for the State of Rhode Island

June 23, 2011

Statement from the Office of Governor Lincoln D. Chafee

Governor Lincoln D. Chafee today declined the U.S. Government's request for temporary federal custody of Jason Wayne Pleau.

Mr. Pleau is incarcerated in the Adult Correctional Institute (ACI) and currently stands untried for the September 10, 2010 robbery and murder of David D. Main. A transfer of Mr. Pleau to temporary federal custody would potentially expose him to the death penalty, a penalty consciously rejected by the State of Rhode Island, even for those guilty of the most heinous crimes.

"My disapproval of the federal government's request should in no way minimize the tragic and senseless nature of Mr. Main's murder," Governor Chafee said. "The person or persons responsible for this horrific act must, and will, be prosecuted and punished to the full extent of the law. I extend my deepest sympathy to Mr. Main's family for their unspeakable loss."

"Despite the horrific nature of this crime, however, the State of Rhode Island would not impose the death penalty," Governor Chafee continued. "In light of this longstanding policy, I cannot in good conscience voluntarily expose a Rhode Island citizen to a potential death penalty prosecution. I am confident that Attorney General Kilmartin and Rhode Island's criminal justice system are capable of

ensuring that justice is served in this matter."

**UNITED STATES DISTRICT COURT**
**DISTRICT OF RHODE ISLAND**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| | : | |
| vs. | : | Cr. No. 10-184-01S |
| | : | |
| JASON W. PLEAU, Defendant | : | |

**WRIT OF HABEAS CORPUS AD PROSEQUENDUM**

TO: THE WARDEN, ADULT CORRECTIONAL INSTITUTIONS, RHODE ISLAND DEPARTMENT OF CORRECTIONS, CRANSTON, RHODE ISLAND; THE UNITED STATES MARSHALS SERVICE; AND ANY OTHER APPROPRIATE FEDERAL LAW ENFORCEMENT OFFICER.

Pursuant to the foregoing Petition of the United States and Order of the Honorable William E, Smith, District Court Judge, you are commanded to produce the body of defendant JASON W. PLEAU, born in the year 1977, presently incarcerated at the Adult Correctional Institutions (High Security Center), Rhode Island Department of Corrections, Cranston, Rhode Island, before the United States District Court for the District of Rhode Island, in the Courtroom of United States Magistrate Judge David L. Martin, on FRIDAY, July 8th, 2011 , at 11:00 AM,

for an arraignment in the above-entitled matter, and at any subsequent times ordered by the court until the termination of proceedings in this court; and you are further directed to retain the defendant in the custody of the Attorney General of the United States, or to abide by such order of the above entitled court as shall thereafter be made concerning the custody of said prisoner, when his presence before this court is no longer required.

WITNESS the Honorable William E. Smith, United States District Court Judge for the District of Rhode Island.

**DATED**: 6/30/11

**DAVID A. DIMARZIO, CLERK**
**UNITED STATES DISTRICT COURT**
By: /s/ Ryan H. Jackson
Ryan H. Jackson
Deputy Clerk

**UNITED STATES DISTRICT COURT**
**DISTRICT OF RHODE ISLAND**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| | : | |
| vs. | : | Cr. No. 10-184-01-S-DLM |
| | : | |
| JASON W. PLEAU, Defendant | : | |

**WRIT OF HABEAS CORPUS AD PROSEQUENDUM**

TO: THE WARDEN, ADULT CORRECTIONAL INSTITUTIONS, RI DEPARTMENT OF CORRECTIONS, CRANSTON, RI; THE UNITED STATES MARSHALS SERVICE; AND ANY OTHER APPROPRIATE FEDERAL LAW ENFORCEMENT OFFICER.

You are commanded to produce the body of defendant JASON W. PLEAU, presently incarcerated at the Adult Correctional Institutions (High Security Center), Rhode Island Department of Corrections, Cranston, RI 02920 before **David L. Martin, United States Magistrate Judge** of the United States District Court for the District of Rhode Island, in **Courtroom B**, on **Wednesday, May 30, 2012**, at **3:00 p.m.**, for **an Arraignment** in the above-entitled matter, and at any subsequent times ordered by the court until the termination of proceedings in this court; and you are further directed to retain the defendant in the custody of the Attorney General of

the United States, or to abide by such order of the above entitled court as shall thereafter be made concerning the custody of said prisoner, when his presence before this court is no longer required.

WITNESS the Honorable David L. Martin, David L. Martin, United States Magistrate Judge for the District of Rhode Island.

**DATED**: May 29, 2012

**DAVID A. DIMARZIO, CLERK**
**UNITED STATES DISTRICT COURT**
By: /s/Ryan Jackson
Ryan Jackson
Deputy Clerk

(Arraignment)

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF RHODE ISLAND**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **CR No. 10-** |
| | ) | **00184-S** |
| | ) | |
| **JASON W. PLEAU,** | ) | |
| **Defendant.** | ) | |

**NOTICE OF INTENTION TO SEEK THE DEATH PENALTY AS TO DEFENDANT JASON W. PLEAU**

Now comes the United States of America, by and through its undersigned counsel, and pursuant to 18 U.S.C. § 3593(a), hereby gives notice that the circumstances of this case are such that, in the event Defendant Jason W. Pleau ("Defendant") is convicted of a capital offense relating to the death of David Main, a sentence of death is justified and the United States will seek a sentence of death. Specifically, the United States will seek a sentence of death for Count Three of the Indictment which charges Defendant with possessing, using, carrying, and discharging a firearm during and in relation to a crime of violence that caused the death of David Main, in violation of 18 U.S.C. §§ 924(c) and (j). For this count, the Government proposes to prove the following factors beyond a reasonable doubt as justifying a sentence of death.

A. Statutory Threshold Factors - 18 U.S.C. § 3591(a).

1. Defendant was 18 years of age or older at the time of the offenses. 18 U.S.C. § 3591(a).

2. Defendant intentionally killed David Main. 18 U.S.C. § 3591(a)(2)(A).

3. Defendant intentionally inflicted serious bodily injury that resulted in the death of David Main. 18 U.S.C. § 3591(a)(2)(B).

4. Defendant intentionally participated in an act, contemplating that the life of a person would be taken and intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and David Main died as a direct result of the act. 18 U.S.C. § 3591(a)(2)(C).

5. Defendant intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and David Main died as a direct result of the act. 18 U.S.C. § 3591(a)(2)(D).

B. Statutory Aggravating Factors - 18 U.S.C. § 3592(c).

1. Defendant, in the commission of the offense, knowingly created a grave risk of

death to one or more persons in addition to the victim of the offense. 18 U.S.C. § 3592(c)(5).

2. Defendant committed the offense in the expectation of the receipt of anything of pecuniary value. 18 U.S.C. § 3592(c)(8).

C. Non-Statutory Aggravating Factors Authorized Under 18 U.S.C. §§ 3592(c) and 3593(a).

1. **Victim Impact Evidence.**

As demonstrated by the victim's personal characteristics as an individual human being and the impact of the death upon the victim and the victim's family and friends, Defendant caused injury, harm, and loss to the victim and the victim's family and friends, including at least Kathleen Main, Michael D. Main, David M. Main, Bonita I. Main, Heather Hitchen, and Deborah Smith. 18 U.S.C. § 3593(a).

2. **Participation in Other Serious Acts of Violence.**

Defendant participated in the commission of other serious acts of violence, including but not limited to the following:

a. burglary of the dwelling of J[redacted] D[redacted], on or about October 5, 1996, in Woonsocket, RI.

b. robbery of B[redacted] G[redacted] at her dwelling, on or about October 7, 1996, in Woonsocket, RI.

c. felony assault of P[redacted] L[redacted] and robbery of A[redacted] E[redacted], on or about October 14, 1996, at a store in Woonsocket, RI.

d. attempted robbery of M[redacted] D[redacted], on or about October 21, 1996, at a restaurant in Bellingham, Massachusetts.

e. robbery of R[redacted] C[redacted], on or about October 22, 1996, at a store in Woonsocket, RI.

f. A felony assault of a correctional officer on or about March 10, 2000, at the Adult Correctional Institutions in Cranston, RI.

g. armed robbery of Chan's Restaurant on or about August 8, 2010, in Woonsocket, RI.

3. **Future Dangerousness.**

Defendant is likely to commit criminal acts of violence in the future that would constitute a continuing and serious threat to the lives and safety of others, as evidenced by at least one or more of the following:

a. **Continuing Pattern of Violence.**

Defendant has engaged in a continuing pattern of violence, attempted violence, and threatened violence, including but not limited to the crimes alleged against Defendant in the Indictment and at least the following:

(i) burglary of the dwelling of J[redacted] D[redacted], on or about October 5, 1996, in Woonsocket, RI.

(ii) robbery of B[redacted] G[redacted] at her dwelling, on or about October 7, 1996, in Woonsocket, RI.

(iii) felony assault of P[redacted] L[redacted] and robbery of A[redacted] E[redacted], on or about October 14, 1996, at a store in Woonsocket, RI.

(iv) attempted robbery of M[redacted] D[redacted], on or about October 21, 1996, at a restaurant in Bellingham, Massachusetts.

(v) robbery of R[redacted] C[redacted], on or about October 22, 1996, at a store in Woonsocket, RI.

(vi) a felony assault of a correctional officer, on or about March 10, 2000, at the Adult Correctional Institutions in Cranston.

(vii) armed robbery of Chan's Restaurant, on or about August 8, 2010, in Woonsocket, RI.

b. **Low Rehabilitative Potential.**

Defendant has demonstrated a low potential for rehabilitation as demonstrated by, but not limited to, the following:

(i) Defendant committed the offenses charged in the Indictment while Defendant was on parole;

(ii) Defendant committed the offenses charged in the Indictment after serving over 12 years in prison;

(iii) Defendant committed other criminal offenses including but not limited to the robbery of Chan's Restaurant on August 8, 2010, while Defendant was on parole;

(iv) Defendant committed a serious assault on a correctional officer while incarcerated; and,

(v) Defendant has committed numerous disciplinary infractions during periods of incarceration.

c. **Lack of Remorse.**

Defendant has not expressed remorse for killing David Main as indicated by his actions following the killings, and his

statements to his accomplices and to law enforcement agents during the course of and following the offenses alleged in the Indictment.

The United States further gives notice that in support of imposition of the death penalty, it intends to rely upon all the evidence admitted by the Court at the guilt phase of the trial and the offenses of conviction as described in the Indictment as they relate to the background and character of Defendant, his moral culpability, and the nature and circumstances of the offenses charged in the Indictment.

Respectfully submitted,

UNITED STATES OF AMERICA

By its attorneys,

PETER F. NERONHA
UNITED STATES ATTORNEY

/s/ Adi Goldstein
/s/ William Ferland
ADI GOLDSTEIN
WILLIAM J. FERLAND
United States Attorney's Office
50 Kennedy Plaza 8th Floor
Providence, RI 02903
(401)709-5000

CERTIFICATION OF SERVICE

On this 18th day of June, 2012, I caused the within Notice of Intention to Seek the Death Penalty as to Defendant Jason W. Pleau to be filed electronically and it is available for viewing and downloading from the ECF system.

Electronic Notification:

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Sasson, Turnbull, & Hoose
100 Main Street
3rd Floor
Northampton, MA 01060

Robert B. Mann, Esq.
Mann & Mitchell
1 Turks Head Building
Suite 610
Providence, RI 02903

/s/ ADI GOLDSTEIN
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