No. 12-___

IN THE

Supreme Court of the United States

JASON W. PLEAU

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

The Interstate Agreement on Detainers Act (IAD Act), Pub. L. No. 91-538, 84 Stat. 1397 (1970) (codified as amended at 18 U.S.C. app. 2), establishes rules and procedures to govern the situation in which one "State" brings criminal charges against a person imprisoned in another "State." The Federal Government is a party to the Act; accordingly, the IAD provides that "[a]s used in this agreement[,] 'State' shall mean a State of the United States [or] the United States of America." Art. II(a).

As is relevant here, the IAD provides that when "the appropriate authority in the State where [the] indictment, information, or complaint" is pending requests temporary custody of a prisoner in order to try him, "the Governor of the sending State" – that is, the state in which the prisoner is incarcerated – "may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner." Arts. IV(a) & V(a). Once the United States has invoked the IAD, an attempt to obtain a prisoner pursuant to a writ of habeas corpus *ad prosequendum* constitutes a "written request for temporary custody" under the IAD. *United States v. Mauro*, 436 U.S. 340, 361-62 (1978).

The question presented is the following: when the United States has invoked the IAD and seeks temporary custody of a state prisoner by means of a writ of habeas corpus *ad prosequendum*, may the Governor of the sending State – pursuant to the plain language of the Agreement – disapprove that request?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Pleau respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a) is published at 680 F.3d 1. The panel opinion of the First Circuit (Pet. App. 41a) was withdrawn and is now unpublished. The opinion of the United States District Court for the District of Rhode Island (Pet. App. 80a) is unpublished, but is available at 2011 WL 2605301.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2012. Pet. App. 1a. On July 27, 2012, Justice Breyer extended the time in which to file this petition to and including August 21, 2012. No. 12A108. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Compact Clause, U.S. Const. art. I, § 10, cl. 3, provides: "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state."

The Interstate Agreement on Detainers Act is reproduced at Pet. App. 88a-101a.

STATEMENT OF THE CASE

I. The Interstate Agreement On Detainers

1. Up until the 1950s, the states and the federal government employed a series of haphazard and dysfunctional procedures to deal with the situation in which one jurisdiction wanted to pursue criminal charges against someone incarcerated in another jurisdiction. *See* COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1957, at 74, 78 (1956). To notify one another of charges outstanding against already-incarcerated prisoners, jurisdictions would file a "detainer," i.e., "a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer." *Id.* at 74. Although convenient, these detainers often created numerous problems for both the prisoner and the prison authorities charged with his rehabilitation. *United States v. Mauro*, 436 U.S. 340, 359-60 (1978).

After filing detainers, jurisdictions could also request temporary custody of prisoners in order to try them – something the federal government sometimes pursued by obtaining writs of habeas corpus *ad prosequendum*. Courts held that compliance with such writs was a matter of comity. That is, "[i]n spite of the terminology of the [*ad prosequendum*] writ, the consent of [state] authorities was necessary to obtain the custody" of state prisoners. *United States ex rel. Moses v. Kipp*, 232 F.2d 147, 150 (7th Cir. 1956); *accord United States v. Perez*, 398 F.2d 658, 660 (7th Cir. 1968); *Gordon v. United States*, 164 F.2d 855, 860-61 (6th Cir. 1947); *Lunsford v. Hudspeth*, 126 F.2d 653, 655 (10th Cir. 1942).

2. In the mid-1950s, recognizing that "proper correctional treatment is not possible until the detainer system is modified," SUGGESTED STATE LEGISLATION at 74, the Council of State Governments drafted the Interstate Agreement on Detainers (IAD). The IAD is an interstate compact designed to provide for more "orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." Art. I; *see also Alabama v. Bozeman*, 533 U.S. 146, 148 (2001). Among other things, and central to this case, Article IV(a) allows the prosecutor or other "appropriate officer" in a jurisdiction "in which an untried indictment, information, or complaint is pending" to request temporary custody of a prisoner incarcerated elsewhere in order to try him. But, consistent with previously existing comity principles, such a request need not automatically be honored. Within thirty days of a request for temporary custody, "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." Art. IV(a).

The states were immediately free to adopt the compact, Congress having previously granted advance consent for the states to enter into interstate compacts "for cooperative effort and mutual assistance in . . . the enforcement of their respective criminal laws and policies." Crime Control Consent Act of 1934, 48 Stat. 909 (codified as amended at 4 U.S.C. § 112(a)); *see also Cuyler v. Adams*, 449 U.S. 433, 442 (1981). Within a dozen years of the IAD's creation, twenty-five states had adopted the

Agreement, S. REP. NO. 91-1356, at 1 (1970), and now forty-eight have done so.

In the hope that "the procedures provided in the agreement will be available on both an interstate and a federal-state level," the IAD's drafters – with representatives of the U.S. Department of Justice in attendance, *Mauro*, 436 U.S. at 350 n.17 – also left open the possibility of the federal government's participation. *See* SUGGESTED STATE LEGISLATION at 78. The Agreement thus provides that "[a]s used in this agreement[,] 'State' shall mean a State of the United States [or] the United States of America." Art. II. In 1970, the United States and the District of Columbia joined the IAD by enacting the Interstate Agreement on Detainers Act. Pub. L. No. 91-538, 84 Stat. 1397 (1970) (codified as amended at 18 U.S.C. app. 2).

The IAD Act contains two "[s]pecial provisions" expressly treating the United States differently than States when it is the jurisdiction requesting custody of a prisoner. 18 U.S.C. app. 2 § 9. But nothing in the Act or Agreement exempts the United States from the disapproval provision in Article IV(a).

II. Facts And Procedural History

1. In 2010, petitioner was serving an eighteen-year state sentence for parole and probation violations at the Rhode Island Adult Correctional Institution (ACI). Pet. App. 2a. After an investigation implicated petitioner in the killing of a gas station manager outside a bank, *id.* 80a, the state of Rhode Island charged him with murder.

Later that year, the United States also filed a criminal complaint against petitioner in connection

with the same killing. *Id.* An indictment soon followed, which noted that petitioner and his co-defendants were eligible for the death penalty. *Id.* 43a & 81a-82a. The federal government has since announced that it wishes to seek a death sentence against petitioner.

Before the State could proceed on its own murder charge, the United States elected to invoke the IAD to secure petitioner's presence for trial on the federal charges. *Id.* 43a. In late 2010, the United States Marshals Service lodged a detainer against petitioner with the ACI. In May of 2011, the United States transmitted a request for temporary custody. *Id.*

Petitioner's lawyers responded by writing to Rhode Island Governor Lincoln Chafee and asking him, pursuant to Article IV(a) of the IAD, to disapprove the custody request. Within thirty days of the federal government's request, Governor Chafee disapproved petitioner's transfer. *Id.* Governor Chafee issued a statement explaining that "in light of Rhode Island's conscious rejection of the death penalty, even for those convicted of the most heinous crimes, he could not 'in good conscience voluntarily expose a Rhode Island citizen to a potential death penalty prosecution.'" Br. for Gov. Lincoln D. Chafee as Amicus Curiae in Support of Pet'r at 4, *United States v. Pleau*, 680 F.3d 1 (1st Cir. 2012) (No. 11-1775) (quoting the Governor's statement).

2. In response to Governor Chafee's decision to disapprove petitioner's transfer, the United States sought a writ of habeas corpus *ad prosequendum* in the United States District Court for the District of Rhode Island ordering the Governor to turn him over to federal authorities. Pet. App. 44a. Authorized by

the federal habeas statute, 28 U.S.C. § 2241(c)(5), the *ad prosequendum* writ was the historic method by which federal authorities sought to obtain custody of state prisoners for trial on federal charges, and such writs remain available today. Pet. App. 2a; *see also Carbo v. United States*, 364 U.S. 611 (1961) (discussing the history of the writ). This Court has held, however, that once the United States has invoked the IAD, a writ of habeas corpus *ad prosequendum* constitutes a "written request for temporary custody" under the IAD just like any other form of request for temporary custody. *Mauro*, 436 U.S. at 361. Accordingly, petitioner objected to the federal request for the writ, arguing that the Governor's disapproval under Article IV(a) foreclosed enforcement of such a writ.

The district court did not disagree that the plain text of the IAD allows a governor, at a state prisoner's request, to disapprove another jurisdiction's request for temporary custody. The court nevertheless issued the writ, reasoning that in light of the "immutable principles" encapsulated in the Supremacy Clause, Article IV(a)'s disapproval provision "could not[] confer upon a governor the authority to dishonor a federal court's writ of habeas corpus *ad prosequendum*." Pet. App. 85a; *see also id.* 86a ("[T]here can be no question that a State's dishonoring of a federal writ violates the Supremacy Clause").

3. Petitioner appealed to the First Circuit, and in the alternative, sought a writ of prohibition, seeking to prevent enforcement of the habeas writ. *Id.* 2a-3a. Governor Chafee appeared in the case in support of petitioner, first as amicus curiae and, following oral

argument, as an intervenor. *Id.* 44a. A panel of the court stayed the habeas writ and took the matter under advisement. *Id.* 3a.

The panel subsequently held, over Judge Boudin's dissent, in favor of petitioner and the Governor. *Id.* 65a. Like the district court, the panel started from the premise that the IAD "plainly mandates that a governor be allowed to reject a transfer request." *Id.* 59a. But unlike the district court, the panel deemed it "axiomatic that we must apply the statute as written." *Id.* The panel reasoned that while the Supremacy Clause might prevent a governor, in the absence of any federal statute, from dishonoring an *ad prosequendum* writ, Congress was perfectly free in enacting the IAD Act to relinquish whatever federal supremacy it had and enter the compact on equal footing with the sovereign states. Pet. App. 54a-55a. Consequently, once the federal government chooses to invoke the IAD, "it may not seek to erase the memory of that decision by means of an ensuing habeas writ." *Id.* 63a.

4. On rehearing en banc, a bare majority (three of five judges) of the First Circuit vacated the panel decision and affirmed the district court. *Id.* 11a.[1] The majority did not disagree with the panel's textual analysis of the IAD. Instead, the majority declared, for two reasons, that "canons of construction, interpretative rules for compacts, and conjectures

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[1] Neither the panel nor the en banc court saw the need to determine whether petitioner had standing to challenge the legitimacy of the federal writ, because Governor Chafee clearly had the right to do so. Pet. App. 3a-4a & 50a.

about [congressional intent] are all *beside the point*." *Id.* 10a (emphasis added).

First, the majority asserted that the notion that Article IV(a) applies to the United States "fails the test of common sense." *Id.* That is, in light of the Supremacy Clause, the majority could "hardly imagine Congress, whether in approving the IAD or at any other time, empowering a state governor to veto a federal habeas writ." *Id.*

Second, the majority claimed that a short passage in this Court's opinion in *Mauro* supported its intuition. In that passage, this Court stated that "*[i]f* a State has never had authority to dishonor an *ad prosequendum* writ issued by a federal court, then [Article IV(a)'s disapproval provision] could not be read as providing such authority." 436 U.S. at 363. According to the majority, this passage "clearly dictates" that the United States had the power before the IAD existed to enforce *ad prosequendum* writs against disapproving states and that it retained that power after entering into the compact. Pet. App. 5a-7a.

The majority acknowledged that the Second Circuit has reached the opposite conclusion, namely that Article IV(a) does indeed give governors the authority to refuse federal requests for temporary custody. *Id.* 9a (citing *United States v. Scheer*, 729 F.2d 164, 170 (2d Cir. 1984)). But the majority declared that that decision was based on "a misreading of *Mauro*." *Id.*

Judge Torruella, joined by Judge Thompson, dissented, adhering to their previous view that "the IAD's plain language and history make clear" that a governor has the right to refuse a federal request for

temporary custody of a state prisoner. *Id.* 12a. In light of the plain text, they believed that the court should "go no further, for there is nothing equivocal in [Article IV(a)'s language] nor is there anything else in this *federal* statute which contravenes or dilutes the discretion that *Congress* has granted to a State Governor." *Id.* 21a (emphases in original).

Nor could the dissent discern any basis in *Mauro* or "common sense" for disregarding the plain meaning of Article IV. One of *Mauro*'s central holdings 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*." *Mauro*, 436 U.S. at 349. Pursuant to this holding, Judge Torruella emphasized, "[t]here should 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." Pet. App. 13a n.8. At any rate, the passage on which the majority relied did not command a contrary result because the passage was "patently conditional, and not a statement as to the actual state of the law." *Id.* 31a.

Judge Torruella also rejected the majority's Supremacy Clause-based reasoning, observing that "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." *Id.* 17a (emphases in original). After all, he remarked, "[i]t was the United States' choice to proceed against

Pleau by invoking the IAD," and "[t]he 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.* 33a.

5. Petitioner and Governor Chafee sought to stay the mandate pending resolution of a petition for a writ of certiorari to this Court. *Id.* 73a. The First Circuit – again by a bare majority – denied the stay, noting that "objections based on the detainer statute would not be mooted" by petitioner's transfer or a federal trial. *Id.* 75a. Judges Torruella and Thompson would have granted the stay in light of, among other things, the "split of authority among the circuits regarding the proper reading of *Mauro*." *Id.* 77a.

Petitioner is now in federal custody. Pretrial proceedings are underway, and trial is currently scheduled for September of 2013.

REASONS FOR GRANTING THE WRIT

This case presents an extremely important question of statutory interpretation: Does the Interstate Agreement on Detainers Act (IAD Act), Pub. L. No. 91-538, 84 Stat. 1397 (1970) (codified as amended at 18 U.S.C. app. 2), which provides that a governor may disapprove another jurisdiction's request for temporary custody of one of its prisoners, apply when the United States is the jurisdiction making the request? Based on any ordinary reading of the IAD's text, the answer is yes. The plain language makes crystal clear that a governor may refuse a request and that the United States is treated as a state for purposes of the Agreement. The IAD's

structure and purpose bolster the plain meaning of the text.

Without disagreeing with this analysis or even so much as mentioning the IAD's crucial language, a bare majority of the First Circuit nevertheless concluded that the United States may obtain temporary custody of a state prisoner after finding itself rebuffed by a governor invoking his refusal rights under Article IV(a). Relying on its understanding of the Supremacy Clause as inalterably "overrid[ing] any contrary position or preference of [a] state," and an inconclusive passage from the Court's decision in *United States v. Mauro*, 436 U.S. 340 (1978), the majority declared that it "fails the test of common sense" to imagine Congress entering into a cooperative agreement with the states that treats the states as equal and independent sovereigns. Pet. App. 7a, 10a. Accordingly, the First Circuit gave the federal government free license to avail itself of those aspects of the IAD it finds convenient and avoid application of those it does not.

This Court should review that decision not only because it essentially reaches the bizarre conclusion that a *federal* statute (which is what the IAD Act is) violates the Supremacy Clause, but also because it deepens a circuit conflict. The Second Circuit has held that the IAD's disapproval provision is enforceable when the United States is the jurisdiction requesting temporary custody of a state prisoner, while the First, Third, and Fourth Circuits have held that it is not. Furthermore, the United States files thousands of detainers each year and enjoys the many advantages offered by the IAD's easy and efficient procedures. It is entirely appropriate – and

indeed critical to the proper operation of this and other interstate compacts to which the United States is a party – that the United States should be bound by the restrictions that attend these detainers, just like every other party to this cooperative agreement.

I. The First Circuit's Opinion Defies The Text, Structure, And Purposes Of The IAD.

"[A]n interstate compact is not just a contract; it is a federal statute enacted by Congress." *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312 (2010). Accordingly, the IAD, and the Act implementing it, are federal statutes subject to ordinary principles of statutory construction. *Cuyler v. Adams*, 449 U.S. 433, 442 (1981). Those principles dictate that a state governor may refuse a federal request for temporary custody of a state prisoner. And contrary to the First Circuit's holding, neither any "common sense" conception of the Supremacy Clause nor this Court's decision in *Mauro* requires ignoring that plain meaning of the IAD.

A. The Plain Meaning Of The IAD Dictates That A Governor May Refuse A Federal Request For Temporary Custody Of A State Prisoner.

The text, structure, and purpose of the IAD, as well as the Act implementing it, make absolutely clear that a governor may refuse a request for temporary custody of a state prisoner.

1. *Text* – In interpreting a statute, we begin "where all such inquiries must begin: with the language of the statute itself," *United States v. Ron*

Pair Enters., Inc., 489 U.S. 235, 241 (1989), keeping in mind the "cardinal canon" "that a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Just as with any other federal statute, this Court has made clear that it "will 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. at 2313 (alteration in original) (internal quotation marks and citations omitted).

Here, Article IV(a) 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." (emphasis added). This Court has explained that this provision means just what it says: for thirty days following receipt of a request for temporary custody, "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*, 449 U.S. at 444; *see also id.* at 446 n.13 ("[Article IV(a)] authorizes the Governor of the sending State to disapprove th[e] custody request . . . .").

The IAD is equally clear that the disapproval provision applies when the federal government is the party requesting temporary custody of a prisoner. Article II, in a sentence that admits no ambiguity, says, "'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; [or] the Commonwealth of Puerto Rico." (emphasis added). Article VIII reinforces the unqualified nature of the United States' participation, providing 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." (emphasis added).

As the two First Circuit dissenters explained, this text is so unequivocal that one "need go no further." Pet. App. 21a. But even if one does, further analysis simply confirms the plain meaning of these provisions.

2. *Structure* – Two aspects of the IAD's structure underscore that the disapproval provision applies when the federal government is attempting to be the receiving State. First, as this Court held in *Mauro*, the other provisions of Article IV – namely, the speedy trial rules in Article IV(c) – apply fully to the United States. 436 U.S. at 361-62. It would be anomalous, to say the least, for the United States to be subject to Article IV(c) but exempt from Article IV(a) when the Agreement's text provides no basis for distinguishing between these subsections.

Second, other provisions of the IAD and the Act implementing it demonstrate that when Congress and the Agreement's drafters wanted to treat the United States differently than other parties, they did so explicitly. Section 9 of the federal statute – added eighteen years after Congress initially joined the IAD and ten years after *Mauro* held that the United States is bound by the Agreement's restrictions when it elects to use its procedures – imposes two "[s]pecial

provisions when [the] United States is a receiving State," neither of which involves Article IV(a). 18 U.S.C. app. 2 § 9 (providing that the dismissal of federal charges under the Act may be with or without prejudice and that the United States may return a prisoner to state custody prior to trial without violating the Act so long as the prisoner is notified and granted opportunity for a hearing). In addition, Article V(a) of the original Agreement provides that "in the case of a Federal prisoner," a receiving State is entitled either to temporary custody of the prisoner *or* to "the prisoner's presence in Federal custody at the place of trial," whereas any other sending State must deliver a prisoner into the custody of the receiving State.

These are the sole exceptions. For all other purposes, the IAD treats the United States identically to every other party. To read in any other exemption would violate the canon of *expressio unius est exclusio alterius*, which dictates that "[w]here Congress explicitly enumerates certain exceptions" to the general functioning of a statute, "additional exceptions are not to be implied." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (explicit exception to the default statute of limitations in § 1681p of the Fair Credit Reporting Act precludes finding other, implied exceptions to the limitations period); *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (Federal Rule of Civil Procedure 9(b)'s heightened pleading standard for cases involving fraud or mistake is exclusive); *cf. Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) ("[T]he language of the [IAD] militates against an implicit exception,

for it is absolute."). That Congress deliberately and explicitly excluded the United States from only some provisions of the IAD leaves no doubt that it both knowingly and intentionally bound the United States to those provisions it left unaltered.

3. *Purpose* – The IAD is designed to benefit state prisoners and states with custody over them. As the Senate Judiciary Committee noted when urging the United States to adopt the Agreement, its rules "permit the prisoner to secure a greater degree of certainty as to his future and to enable the prison authorities to plan more effectively for his rehabilitation and return to society." S. REP. NO. 91-1356, at 2 (1970); *see also* COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1957, 74-75 (1956) (discussing the motivations behind the IAD).

Allowing the governor of a sending State to deny a request for temporary custody is entirely consistent with these goals. It ensures that the state can retain uninterrupted custody of the prisoner for the duration of his sentence – a factor which certainly does not hamper, and which may well facilitate, the state's rehabilitation efforts. And because the prisoner retains the right to demand trial on outstanding charges on his own initiative under Article III, applying Article IV(a) in no way interferes with the prisoner's ability to achieve finality if he so desires. But if neither the sending State nor the prisoner wants the finality and certainty the Agreement offers, then there is no problem with allowing the charges to remain pending and requiring the receiving State to wait for the prisoner's release. *Accord* Arts. III & IV (providing

no statutory time limit for trying a prisoner upon the lodging of a detainer unless and until the prisoner invokes his rights under Article III or the receiving State requests temporary custody under Article IV(a)).

B. Neither "Common Sense" Nor This Court's Decision In *United States v. Mauro* Justifies Disregarding The Plain Meaning Of The IAD.

The First Circuit offered no answer for these statutory construction arguments. Indeed, the court could not even bring itself to quote, much less attempt to construe, Article IV(a) in its opinion. Instead, the First Circuit declared that "canons of construction" are "beside the point" for two reasons: (1) in light of the Supremacy Clause, the notion that Congress would have wanted to put itself on equal footing with states in the IAD "fails the test of common sense"; and (2) this Court's decision in *Mauro* dictates that states cannot disregard federal requests for temporary custody. Pet. App. 5a & 10a. Neither argument withstands scrutiny.

1. Under its "common sense" conception of the Supremacy Clause, the First Circuit deemed it "improbab[le]" that Congress would decide to put itself on equal footing with the states. *Id.* 10a. That is, the majority indicated that the IAD as written was in direct conflict with the Supremacy Clause, and implicitly accepted the district court's conclusion that Congress could not turn "immutable principles of federalism and federal supremacy on their head" by "confer[ring] upon a governor the authority to dishonor a federal court's writ of habeas corpus *ad*

prosequendum." *Id.* 85a (district court opinion); *see id.* 7a-9a (First Circuit).

This analysis is plainly incorrect. Congress is of course entitled to waive its Supremacy Clause rights. *See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (Congress may authorize states to apply workers' compensation laws to federal facilities); *Penn. Dairies v. Milk Control Comm'n of Penn.*, 318 U.S. 261, 269 (1943) (Congress may authorize the states to tax or otherwise regulate government agencies); *McKenna v. Wash. Metro. Area Transit Auth.*, 829 F.2d 186, 188 (D.C. Cir. 1987) (Congress may provide that an interstate compact's provisions trump federal law). Put another way, because the Supremacy Clause runs only against the "Laws of any State," U.S. Const. Art. VI cl. 2, it is impossible for a *federal statute* granting rights to the states to "violate[] the Supremacy Clause." Pet. App. 86a (district court opinion).

To the extent the First Circuit based its "common sense" argument not on the Supremacy Clause directly but on congressional intent, its reasoning remains unpersuasive. A court may disregard the plain language of a federal statute only if the plain meaning is "absurd or glaringly unjust." *Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs, Dep't of Labor*, 519 U.S. 248, 261 (1997); *see also Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment) (plain language of a statute controls unless it "would lead to patently absurd consequences that Congress could not *possibly* have intended") (emphasis in original) (internal quotation marks and citations omitted). Indeed, "to justify a departure

from the letter of the law upon [absurdity grounds], the absurdity must be so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

It is hardly absurd to think that Congress would have wanted to treat the states as co-equal sovereigns in this setting. While the Supremacy Clause gives the federal government the power to override the states, the Constitution also treats the states as "separate and independent sovereigns" and contemplates that the federal government will often deal with them as equals. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603 (2012) (opinion of Roberts, C.J, joined by Breyer and Kagan, JJ.); *see also 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."). As this Court has elaborated:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

Saenz v. Roe, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 838 (1995) (Kennedy, J., concurring))). In short, it does

not defy "common sense" to imagine that Congress might have been willing to grant the states co-equal status in a cooperative arrangement for the efficient administration of prisoner transfers. Rather, such co-equal status is entirely consonant with the vital concept of federalism.

Lest there be any doubt, Congress cedes federal power to the states regularly and in a variety of settings. To name just a few examples:

• Congress has empowered the states to regulate in areas where state action might otherwise be preempted. *See, e.g.*, 42 U.S.C. § 2021 (2012) (empowering the Atomic Energy Commission to enter into agreements to cede Commission authority in certain areas to the states); *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993) (noting that the McCarran-Ferguson Act was enacted to explicitly allow states latitude to regulate insurance after the Supreme Court held in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), that insurance was interstate commerce subject to federal regulation).

• Congress has ceded power to states in the field of criminal law and corrections. For instance, Congress has authorized the Attorney General to contract with the states to house federal prisoners in state prisons and provided that while confined in a state prison, a federal prisoner "shall be exclusively under control of the officers having charge [of the prisoner], under the laws of such state." *Ponzi v. Fessenden*, 258 U.S. 254, 263 (1922) (internal quotation marks omitted).

• Congress has joined interstate compacts that authorize state-run commissions to exercise federal

power, *see, e.g.*, *Wash. Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cnty., Md.*, 706 F.2d 1312, 1318-19 (4th Cir. 1983) (state-run commission authorized to exercise federal condemnation power), or even to direct federal agencies, *see Seattle Master Builders Ass'n. v. Pacific Nw. Elec. Power and Conservation Planning Council*, 786 F.2d 1359, 1362 (9th Cir. 1986) (commission composed of state appointees empowered to review federal agency action and to create a power plan to which federal agency must adhere).

In any event, any argument that applying Article IV(a) would transform state prisons into "a refuge against federal charges," Pet. App. 11a, or "embolden" state governors to obstruct enforcement of federal drug and gun laws, Gov't Pet'n for Reh'g at 13-14, *United States v. Pleau*, 680 F.3d 1 (2012) (No. 11-1775), is "properly addressed to Congress, not to the federal courts," *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 97-98 & n.41 (1981); *see also MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994). Congress is fully capable of amending the IAD at any time. *See* 18 U.S.C. app. 2 § 7 ("The right to alter, amend, or repeal this Act is expressly reserved."). For now, as Judge Torruella observed, "[t]he 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." Pet. App. 33a (dissenting opinion).

2. Nor does *Mauro* permit – much less require – disregarding the IAD's plain meaning. To the contrary, *Mauro*'s two core holdings – (i) that "the

United States is a party to the Agreement as both a sending and a receiving State," and (ii) that "[o]nce 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" – actually support the conclusion that the IAD applies to the United States as written. 436 U.S. at 354, 361-62.

The First Circuit nonetheless asserted it was bound by a single paragraph towards the end of the *Mauro* opinion in which the Court said:

> The proviso of Art. IV(a) does not purport to augment the State's authority to dishonor [an *ad prosequendum*] 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.

436 U.S. at 363 (footnote omitted).[2]

Properly understood, this passage does not hold that the federal government is exempt as a "receiving State" from Article IV's disapproval provision. Instead, it merely notes that the IAD itself, which

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[2] The Court did not ground its observations in the statutory text of Article IV(a), instead "relying" – as it sometimes used to do – upon a single piece of "legislative material to provide an authoritative interpretation of a statutory text." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 622 (1991) (Scalia, J., concurring in the judgment).

was drafted in the 1950's as a piece of suggested legislation by a body with no power to bind the federal government, did not give states the power to disregard federal requests for custody. But when Congress adopted the IAD as federal law in 1970 and made the United States a "State" under the IAD Act, the federal government "relinquished any superior sovereign rights that may have preexisted the Agreement" to override a governor's objection to a request for temporary custody. Pet. App. 13a n.8 (Torruella, J., dissenting).

Even if the language from *Mauro* purported to construe not only the IAD but also the IAD Act of 1970, it would not support the First Circuit's holding. The language is "patently conditional." Pet. App. 31a (Torruella, J., dissenting). It supports the First Circuit's holding in this case only *if* the states so clearly lacked the power to dishonor a federal *ad prosequendum* writ when the IAD was drafted that the plain language of the Agreement cannot plausibly be read to allow such disapprovals. However, there is substantial authority indicating that states historically *did* have the power to resist a federal writ. In *Taylor v. Taintor*, for instance, this Court stated:

> 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.

83 U.S. 366, 370 (1872). Decades later the Court reaffirmed this principle of comity when it noted that

"the court which first takes the subject-matter of the litigation into its control . . . must be permitted to exhaust its remedy . . . before the other court shall attempt to take it for its purpose." *Ponzi*, 258 U.S. at 260.

Numerous lower courts later explicitly acknowledged that a state's compliance with a federal *ad prosequendum* writ was governed by comity. *See, e.g.*, *United States ex rel. Moses v. Kipp*, 232 F.2d 147, 150 (7th Cir. 1956) ("In spite of the terminology of the [*ad prosequendum*] writ, the consent of Michigan authorities was necessary to obtain the custody of [the state prisoner]."); *Lunsford v. Hudspeth*, 126 F.2d 653, 655 (10th Cir. 1942) (prisoner transfers may be achieved by a rule of comity, "and this respectful duty is reciprocal, whether federal or state, because neither sovereignty has the power to override it"). Indeed, there are reported instances of the states exercising this authority. *See, e.g.*, *United States v. Perez*, 398 F.2d 658, 660 (7th Cir. 1968) (Arkansas prison authorities indicated they would refuse a federal *ad prosequendum* writ, and court accepted their authority to do so); *Gordon v. United States*, 164 F.2d 855, 860-61 (6th Cir. 1947) (Ohio prison authorities refused to honor a federal habeas writ, and court acknowledged that "no authority could compel" Ohio to produce the prisoners). The First Circuit was simply wrong in assuming states so "patent[ly]" lacked this authority before the IAD, Pet. App. 7a, that the plain language of Article IV(a) cannot be applied with respect to the federal government.

II. The Courts Of Appeals Are Divided Over Whether The IAD's Disapproval Provision Applies When The Federal Government Requests A State Prisoner Under The IAD.

The Third and Fourth Circuits have come to the same conclusion as the First, holding that Article IV(a) does not apply when the United States seeks temporary custody of a state prisoner pursuant to an *ad prosequendum* writ. *See United States v. Graham*, 622 F.2d 57, 59 (3d Cir. 1980) ("Congress did not intend to confer on state governors the power to disobey writs issued by federal courts as 'written requests for custody' under the Act."), *cert. denied*, 449 U.S. 904 (1980); *United States v. Bryant*, 612 F.2d 799, 802 (4th Cir. 1979) ("While the thirty-day period applies to state requests and to other federal 'requests' for custody or availability that do not have operative effect in themselves, it does not apply to a request in the form of a federal writ of habeas corpus ad prosequendum that follows a detainer . . . .") (citation omitted), *cert. denied*, 446 U.S. 919 (1980).[3] In an unpublished opinion, the Tenth Circuit has also deemed Article IV(a) inapplicable to the United States. *See Trafny v. United States*, 311 Fed. Appx. 92, 96 (10th Cir. 2009) ("[Defendant] had no right to

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[3] The denials of certiorari in both *Graham* and *Bryant* predated the conflict among the circuits on this issue. Furthermore, this case presents a far better set of facts on which to decide the question presented than did either *Graham* or *Bryant* because here it is clear that Governor Chafee wanted to (and indeed, did) act on petitioner's request to disapprove his transfer.

petition Utah's governor to reject the writ and hence no entitlement to a thirty-day period before transportation.").

On the other hand, the Second Circuit, in *United States v. Scheer*, 729 F.2d 164 (2d Cir. 1984), has held that Article IV(a) applies even when the United States is the receiving State. Rejecting the precise argument the First Circuit accepted here, the Second Circuit noted that "a writ of *habeas corpus ad prosequendum* is simply equivalent to a 'written request for temporary custody' [under Article IV(a)]," and that "the definition of 'State' in the Act includes the United States." *Id.* at 170. Accordingly, the Second Circuit reasoned that Article IV(a)'s disapproval provision applies against the federal government, especially since *Mauro* prohibits "treating the federal government's participation in the IADA on a different footing than that of the States." *Id.*

The First Circuit majority characterized this discussion in *Scheer* as "dictum" that relied upon "a misreading of *Mauro*." Pet. App. 9a. This "dictum" label, however, is wishful thinking. It is true that the Second Circuit ultimately held that the IAD Act had not been violated because the defendant had waived his right to enforce Article IV(a)'s 30-day waiting period. 729 F.2d at 170-72. But before reaching that holding, the Second Circuit first considered and squarely rejected the government's lead argument that "the 30-day period [was] not violated because the writ of *habeas corpus ad prosequendum* was not abrogated by the United States becoming a party to the [IAD] Act." *Id.* at 170. Having considered and rejected that argument in defense of the judgment

below, the Second Circuit issued a binding *holding* – just as if it had ruled that a certain trial procedure was unconstitutional but that the error in the particular case at hand was harmless. Put another way, the fact that an appellate court ultimately accepts an alternate ground for affirmance has never been thought to render all legal conclusions that come before dicta. *See, e.g.*, *United States v. Tinklenberg*, 131 S. Ct. 2007 (2011); *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Strickler v. Greene*, 527 U.S. 263 (1999). That is presumably why the United States advises its own prosecutors that the Second Circuit disagrees with others on 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." Criminal Resource Manual for U.S. Attorneys, § 534, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00534.htm.

As for the First Circuit's statement that *Scheer* rests on "a misreading of *Mauro*," Pet. App. 9a, that allegation merely confirms the presence of a circuit split on the question presented. *See also id.* 77a (Torruella, J., dissenting from denial of stay) (noting that "there is a split of authority among the circuits" on this issue). Only this Court can resolve this split, since both sides rely upon *Mauro* to reach opposite results. *Compare id.* 5a (*Mauro* "clearly dictates" the result); *Graham*, 622 F.2d at 59 (same); *Bryant*, 612 F.2d at 802 (same), *with Scheer*, 729 F.2d at 170 (*Mauro* precludes United States from using an *ad prosequendum* writ "to avoid its obligations under the [IAD]").

III. The Issue Presented Is Extraordinarily Important, Not Only To States But Also To State Prisoners.

For at least three reasons, this Court should promptly resolve whether the IAD's disapproval provision applies to the federal government.

1. The IAD is a major procedural tool for obtaining federal custody of state prisoners. The United States "makes great use of detainers," *Mauro*, 436 U.S. at 364 n.29, filing "thousands" in a typical year, Pet. App. 52a; *accord* Gov't Pet'n for Reh'g at 12, *United States v. Pleau*, 680 F.3d 1 (2012) (No. 11-1775). Given the frequency with which the federal government uses the IAD, the scope of a governor's authority to refuse a federal request for custody is a recurring question.

2. The issue has practical significance as well, since the United States relies heavily on the IAD. Although the federal government may seek custody of state prisoners through an *ad prosequendum* writ filed independently of a detainer, Pet. App. 2a, it is questionable, pursuant to the cases cited above, whether the government may ever use such a writ to force an unwilling state to relinquish custody over a prisoner. *See supra* at 23-24. And even if the government may do so, the government has still explained that proceeding in that fashion in a large portion of cases would be "untenable," Gov't Pet'n for Reh'g at 14.

This is so because proceeding under the IAD affords the United States some significant advantages over use of the writ alone. Most importantly, the IAD is an easy and effective means for keeping track of inmates in the state system,

providing a "safeguard" against the possibility that a state prisoner might "slip through the cracks and vanish." *Id.* In addition, detainers are considerably simpler devices than *ad prosequendum* writs. A detainer is not a court order and does not require judicial supervision; it is merely "a notification" that a prisoner "is wanted to face pending criminal charges in another jurisdiction." H.R. REP. NO. 91-1018, at 2 (1970); S. REP. NO. 91-1356, at 2 (1970); *see also Mauro*, 436 U.S. at 358-59 & n.25. Finally, the IAD does not mandate that the jurisdiction lodging a detainer take custody of or try the prisoner immediately, whereas a writ of habeas corpus *ad prosequendum* "requir[es] the immediate presence of the prisoner." *Mauro*, 436 U.S. at 358. A detainer thus allows federal prosecutors some latitude in choosing when to take custody of prisoners without risking losing track of them in the interim. Given these advantages, the federal government "considers [detainers] to play an important function," *id.* at 364 n.29, and has every reason to prefer to proceed under the IAD than by an *ad prosequendum* writ alone.

However, the benefits of the IAD come with obligations to which the federal government is, and ought to be, bound. "Any other reading" of the Agreement "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 364 (footnote omitted).

3. State prisoners in particular have a strong interest in the federal government's adherence to the terms of the IAD. "[F]ederalism secures to citizens the liberties that derive from the diffusion of

sovereign power," *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation marks and citation omitted), and "protects the liberty of the individual from arbitrary power," *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Those principles have particular resonance in the context of the IAD. Quite apart from the fact that the United States' refusal to honor Governor Chafee's disapproval directly resulted in petitioner's transfer to federal custody and exposure to the death penalty, Art. IV(a) of the IAD itself explicitly grants a prisoner a "*right* . . . to petition the Governor to disapprove [another jurisdiction's] custody request. *Cuyler*, 449 U.S. at 446 (emphasis added). The district court's order here, and the First Circuit's affirmance of it, nullifies that right as applied to federal requests for custody.

Given this, the lower courts had no basis to question petitioner's standing to contest the federal government's request for the *ad prosequendum* writ. He has a concrete injury-in-fact (the nullification of his right to move the governor to disapprove a request for his temporary custody) that is directly traceable to the federal government's actions and redressable by an appellate court. Indeed, even when governors have not disapproved federal requests for temporary custody of state prisoners, federal courts of appeals have repeatedly taken jurisdiction over prisoners' appeals arguing that they were deprived of the full thirty-day period to seek gubernatorial disapproval. *See Trafny v. United States*, 311 Fed. Appx. 92, 96 (10th Cir. 2009); *United States v. Scheer*, 729 F.2d 164, 170 (2d Cir. 1984); *United States v. Graham*, 622 F.2d 57, 59 (3d Cir. 1980); *United States v. Bryant*, 612 F.2d 799, 802 (4th Cir.

1979). That the governor here acted on petitioner's request makes his standing all the more definite.

The First Circuit nonetheless characterized petitioner's standing as "debatable," Pet. App. 3a, citing cases declaring under various circumstances that state prisoners lacked standing to challenge *ad prosequendum* writs. But not one of the cases that the First Circuit (or the district court) cited is on point. Two predated United States participation in the IAD, *see Ponzi v. Fessenden*, 258 U.S. 254 (1922); *Derengowski v. U.S. Marshal, Minneapolis Office, Minn. Div.*, 377 F.2d 223 (1967); two did not involve detainers, *see United States v. Harden*, 45 Fed. Appx. 237 (4th Cir. 2002); *United States v. Horton*, 107 F.3d 868 (4th Cir. 1997); one is dictum, *see Weekes v. Fleming*, 301 F.3d 1175 (10th Cir. 2002) (prisoner's claim related to the calculation of credit for time served), and one involved neither Article IV(a) nor any other provision of the IAD granting prisoners specific rights, *see Weathers v. Henderson*, 480 F.2d 559 (5th Cir. 1973). The courts deciding these cases had no occasion to consider, much less decide, whether a prisoner has standing to challenge a jurisdiction's attempt to nullify his successful request under the IAD for disapproval of a transfer request.

At any rate, if this Court has any doubt concerning a prisoner's standing to challenge the federal government's execution of its *ad prosequendum* writ, such doubt would only militate in favor of granting this petition along with the Governor's. Were the Court to hold that governors have the power to disapprove a custody request under the IAD, the question of who has standing to vindicate this authority would immediately arise. By

granting both petitions, the Court can avoid having to return to this question in the near future.

CONCLUSION

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

Respectfully submitted,

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