Nos. 12-223 & 12-230

# In The Supreme Court of the United States

LINCOLN D. CHAFEE,
GOVERNOR OF RHODE ISLAND,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

and

JASON PLEAU,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The First Circuit**

## BRIEF FOR AMICI CURIAE THE CATO INSTITUTE AND THE INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONERS


DAVID B. KOPEL
*Counsel of Record*
*for Amici Curiae*
THE INDEPENDENCE INSTITUTE
727 E. 16th Ave.
Denver, CO 80203
(303) 279-6536 ext. 112
david@i2i.org

ILYA SHAPIRO
TIMOTHY LYNCH
THE CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
tlynch@cato.org



COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Does the Supremacy Clause mean that the federal government does not have to obey the procedures specified in a congressional statute, if the statute was a compact between the States and the federal government?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Independence Institute states that it is a non-profit corporation, incorporated in Colorado.

Independence Institute has no parent corporations, nor is there any publicly held corporation that owns more than 10% of its stock.

Pursuant to Supreme Court Rule 29.6, Cato Institute states that it is a non-profit corporation, incorporated in Kansas.

Cato Institute has no parent corporations, nor is there any publicly held corporation that owns more than 10% of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

TABLE OF AUTHORITIES – Continued

## STATEMENT OF AMICI INTEREST[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs. The present case concerns Cato because it involves the erosion of protections for individual rights, including the institution of dual sovereignty.

The Independence Institute is a public policy research organization created in 1984, and founded on the eternal truths of the Declaration of Independence. The Independence Institute has participated as an amicus or party in many constitutional cases in federal and state courts, including *District of Columbia v. Heller*, *McDonald v. Chicago* and the Affordable Care Act cases.

---

[1] Notice of intent to file this brief was provided to the parties in August. This brief is filed with the consent of the attorneys for Petitioner Chafee, Petitioner Pleau, and for Respondent the United States. No counsel for a party authored the brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

The Independence Institute's amicus briefs in *Heller* and *McDonald* (under the name of lead amicus, the International Law Enforcement Educators & Trainers Association, ILEETA) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

## SUMMARY OF ARGUMENT

The First Circuit's decision violates Supreme Court teachings about the relationship between habeas corpus writs and state sovereignty, as explicated by Chief Justice Marshall in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), and by Chief Justice Taft in *Ponzi v. Fessenden*, 258 U.S. 254 (1922). More fundamentally, the First Circuit misuses the Supremacy Clause to make it an absolute trump card to defeat any state claim. This is not, and never has been, the meaning of the Supremacy Clause.

The decision below mangles the Supreme Court's major case about the Interstate Agreement on Detainers Act, *United States v. Mauro*, 436 U.S. 340 (1977). Westlaw characterizes the First Circuit's decision as the "most negative" of the more than 600 lower court cases applying *Mauro.* The decision below does not merely misread *Mauro*, but instead chops quotes and inverts language so as to turn *Mauro* into the opposite of what *Mauro* actually said.

There is no evidence, let alone an "unmistakably clear statement," that any act of Congress, including

the 1789 and 1948 habeas corpus statutes, was intended to abrogate state sovereignty, including the sovereign right of Governors to refuse a writ of habeas corpus *ad prosequendum*.

The First Circuit grants unauthorized additional power (indeed, statutorily forbidden power) to the federal government, which makes it imperative that this Court grant certiorari to protect our constitutional system of dual sovereignty.

## ARGUMENT

### I. The First Circuit's holding is contrary to the original meaning of federal habeas law, as explicated by Chief Justice Marshall.

#### A. Chief Justice Marshall's application of dual sovereignty to the writ of habeas corpus.

The Judiciary Act of 1789, 1 Stat. 73, gave the federal courts a general power to issue writs of habeas corpus. The Act did not specifically mention the writ of habeas corpus *ad prosequendum*, or any other specific habeas corpus writ. Accordingly, the Supreme Court soon faced the question of which habeas writs were constitutionally permissible. Chief Justice Marshall explained that the power of federal courts to issue habeas writs must be construed in light of our constitutional system of dual sovereignty. In particular, application of a habeas corpus writ so as to

violate state sovereignty is unconstitutional. *Ex Parte Bollman,* 8 U.S. (4 Cranch) 75 (1807).

Chief Justice Marshall began his analysis with the *ad respondendum* writ. This common law writ is used to bring a prisoner into court to answer a civil lawsuit against the prisoner. Quoting Blackstone, Chief Justice Marshall explained that the writ is used "when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner and charge him with this new action in the court above." *Id*. at 97, quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *129.

Chief Justice Marshall's opinion for the Court stated that the *ad respondendum* writ could not be issued by a federal court. If the prisoner were already in federal custody, then the writ would be "perfectly useless," since the prisoner would already be in the custody of the same government which wanted him to testify. *Bollman* at 97.

The Chief Justice then explained why the *ad respondendum* writ could not be used by a federal court to mandate the transfer of a prisoner "confined by process from a state court." The rationale speaks directly to the Petitions in the instant case:

> The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court; and in these cases the mode of proceeding is particularly prescribed, and is not by *habeas corpus*. They

> are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government.

*Id*. (italics in original).

The logical implication of the *Bollman* case for the *ad prosequendum* writ is inescapable. Because state courts are *not* "inferior" to the federal courts, a federal court may not use habeas corpus to seize a state prisoner for purposes of a federal trial. The dual sovereignty rationale for federal civil trials (habeas corpus *ad respondendum*) necessarily is exactly the same for federal criminal trials (habeas corpus *ad prosequendum*). Of course States may voluntarily, as a matter of comity, transfer prisoners in response to a federal court *ad prosequendum* writ, and they almost always do so.

### B. This Court's continuing affirmation of the sovereignty of State courts, and of reciprocal comity.

This Court has continued to adhere to Chief Justice Marshall's recognition of the independence and sovereignty of state courts. Affirming state control over the terms of office of state judges, this Court affirmed that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." Gregory v. Ashcroft, 501 U.S. 452, 457 (1991). This Court has always recognized that the court systems of the federal and state governments function as concurrent sovereigns. *See*,

*e.g.*, Ponzi v. Fessenden, 258 U.S. 254, 259 (1922); Covell v. Heyman, 111 U.S. 176, 182 (1884); *Bollman*, 8 U.S. (4 Cranch) at 97.

In *Ponzi*, Chief Justice Taft's opinion for a unanimous Court was joined by Justices Brandeis and Holmes, who were generally sympathetic to broad claims of federal power. All the Justices affirmed that state and federal courts are independent of each other, and that jurisdictional issues between the two must be based on "reciprocal comity":

> We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

258 U.S. at 259.

Justice Black was even more deferential to federal power than were Justices Brandeis and Holmes. He too affirmed the "longstanding public

policy against federal court interference with state court proceedings." Younger v. Harris, 401 U.S. 37, 44 (1971). His opinion for the Court defined the "vital" notion of comity as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*

### C. The text of the habeas corpus statutes.

The writ of habeas corpus *ad prosequendum*, at issue in *U.S. v. Pleau*, like the other individual common law writs, was not mentioned by name in the 1789 Judiciary Act. The Act provided, in relevant part:

> [A]ll the . . . courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law . . . *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Judiciary Act of 1789, § 14, 1 Stat. 73, 81-82.

Chief Justice Marshall held that the first sentence of section 14 implicitly gave federal courts the power to issue the common law writs of habeas corpus *ad prosequendum*, *testificandum* and *deliberandum*, since the Act grants federal courts the power to issue "all other writs, not specifically provided for by statute." Bollman, 8 U.S. (4 Cranch) at 98. All three of these writs are used "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*., citing BLACKSTONE, 3 COMMENTARIES at *129. Justice Marshall further held that, of these writs, only the *ad testificandum* writ was implicated by the last line of Section 14, which provides that "writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are . . . necessary to be brought into court to testify." *Id.* at 99.

The *ad prosequendum* writ was not mentioned by name in the 1789 Judiciary Act, nor in the 1948 statute updating the Judiciary Act.[2] *See generally*

[2] In 1867, Congress expanded the federal habeas writ to cover state prisoners who were being held in violation of their federal rights. This expansion was solidly supported by section 5 of the Fourteenth Amendment, which was then before the States for ratification, and which was fully ratified shortly thereafter. The Fourteenth Amendment was, of course, meant to change state/federal relations regarding the protection of national civil rights. The *Pleau* case, however, does not involve any allegation that Rhode Island is violating Mr. Pleau's federal civil rights, nor is he charged with violating any federal civil rights statute,

(Continued on following page)

Carbo v. United States, 364 U.S. 611, 619 (1961) (discussing the history of the habeas statutes). In its current form, the habeas statute, 28 U.S.C. § 2241, states that "(c) the writ of habeas corpus shall not extend to a prisoner unless . . . (5) It is necessary to bring him into court to testify *or for trial*." (emphasis added). Unlike the 1789 statute, the current statute at least adverts to the existence of the writ of habeas corpus *ad prosequendum*. However, there is no indication that Congress in 1948 intended that adding the language "or for trial" to the statute changed the way that the *ad prosequendum* writ has functioned historically, or under the previous habeas statutes. Rather, the *ad prosequendum* writ is subject to the same limitations that apply to all writs generally, as Chief Justice Marshall discussed at length in *Bollman*.

Congress's general language authorizing issuance of habeas corpus writs did not express an unmistakably clear intent to abrogate state sovereignty. Instead, Congress chose to incorporate the various common law writs only by implication, thereby leaving to the courts the responsibility of determining the applicability of the writs in light of the uniqueness of the American system. *See Bollman* at 97. As discussed *supra*, in the context of the *ad respondendum* writ, Chief Justice Marshall held that such a writ could not be used to compel state action. The very fact

---

so the Fourteenth Amendment is irrelevant to federal habeas powers in this case.

that Justice Marshall had to undertake his analysis of the applicability of the common law writs is an indication that Congress did not make an unmistakably clear statement that those writs were meant to intrude on state powers.

### D. The Supremacy Clause and the Unmistakably Clear Language Rule.

The First Circuit held that the mere existence of a federal habeas corpus statute, in conjunction with the Supremacy Clause, barred Governor Chafee from dishonoring a writ of habeas corpus *ad prosequendum*. United States v. Pleau, 680 F.3d 1, 6 (1st Cir. 2012) (en banc). According to the First Circuit 3-2 majority, "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." *Id.* This simplistic invocation of the Supremacy Clause is contrary to Supreme Court precedent.

The Supremacy Clause plays an important role in the dual-sovereign balance between the States and the federal government. Under the Supremacy Clause, "As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Ashcroft*, 501 U.S. at 460. However, "This is an extraordinary power in a federalist system. It is a power that [the Court] must assume Congress does not exercise lightly." *Id*. As a result, Congress must make it "unmistakably clear in

the language of the statute" if it intends to change the "usual constitutional balance between the States and the Federal Government." *Id*., quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).

If the drafters of the Judiciary Act of 1789 and its 1948 successor intended the *ad prosequendum* writ to have the power to infringe the sovereignty of state courts, they would have explicitly stated such an intention. They never did so. Absent "unmistakably clear" statutory language of an intent to abrogate state sovereignty, courts must assume that Congress intended to maintain the delicate balance of power between the federal and state courts which is central to our system of federalism.

Even if *Gregory v. Ashcroft* had never articulated the "unmistakably clear language" rule, there is *no* evidence that the drafters of the 1789 Judiciary Act and its 1948 successor intended to abrogate state sovereignty. As Justice Chief Marshall pointed out, the original habeas statute was enacted by the First Congress. *Bollman*, at 95. The members of Congress in 1789, who were intimately acquainted with the dual-sovereign system many of them were instrumental in creating, would have been especially mindful of any sovereignty implications. The First Circuit presented no reason to believe that the Congress which enacted the 1948 habeas statute intended to overturn the long-established system of dual sovereignty.

The Supremacy Clause means that the federal government is supreme within its sphere – not that

every federal statute must be construed by implication as demolishing the sovereignty of the States. The First Circuit simply ignored *Gregory v. Ashcroft*'s teaching about how to apply the Supremacy Clause, and the First Circuit offered no evidence that the federal habeas statutes have ever intended that the writ of habeas corpus *ad prosequendum* be treated as a trump card that negates state sovereignty.

If Congress *had* so intended, then the statute would be unconstitutional, for "An act of congress repugnant to the constitution cannot become a law." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803). In *Marbury*, Justice Marshall was considering the constitutionality of another section of the Judiciary Act which granted a federal court the power to issue a certain writ. *Id*. at 173.

That Congress has power over patents does not mean that Congress can use the Supremacy Clause to order state courts to take jurisdiction over certain patent suits which would violate state sovereignty. *See* Alden v. Maine, 527 U.S. 706 (1999). Likewise, the fact that Congress may legislate about certain violent crimes (because of their tenuous relation to interstate commerce) does not mean that Congress can divest state courts and state governments of their legitimate police power to hold and punish prisoners for crimes under state law to the full extent of the punishment imposed by the state.

In the instant case, Rhode Island is ready (and Pleau is ready to plead to) a term of life imprisonment

without parole. Chafee Pet. at 8. Rhode Island is entitled to carry out the full scope of this severe sentence until the day that Pleau dies in a Rhode Island prison. The federal interest in executing Pleau for a crime (murder in the course of a robbery) that has only an attenuated connection to interstate commerce does not outweigh Rhode Island's compelling interest in fully punishing, as the State sees fit, a crime committed on Rhode Island soil by a Rhode Island citizen against another Rhode Island citizen.

Fortunately, the federal habeas corpus acts have never indicated in unmistakably clear language that the federal writ of habeas corpus *ad prosequendum* was intended to be a bold and daring usurpation. Pursuant to *Gregory v. Ashcroft*, the First Circuit was wrong in its interpretation of the habeas corpus statutes, and grossly in error in using the Supremacy Clause to validate that misinterpretation.

## II. The First Circuit evaded and did not follow *U.S. v. Mauro.*

The Interstate Agreement on Detainers Act ("IADA" or "IAD") was enacted by Congress in 1970 to provide for extradition of prisoners from incarceration in one jurisdiction (the "sending state") to another jurisdiction (the "receiving state") for criminal prosecution in the second jurisdiction. 18 U.S.C. app. 2 § 2 (1970). The IADA gave States and the federal government the option to become parties to the Agreement.

*Id.* § 2. The federal government voluntarily joined the IADA.

Prior to the IADA, states had varying processes for filing detainers against prisoners in other jurisdictions. The IADA provides uniformity and regularity. For example, Article IV(c) sets time restrictions for prosecution following a detainer ("Time Limit Provision"), thus protecting the Sixth Amendment right to a speedy trial. *Id.*

Pursuant to IADA Article IV(a), the Governor of a state which holds a prisoner has a specifically reserved right to refuse to send the prisoner to another jurisdiction ("Refusal Provision"). *Id.* As detailed *infra*, both the House and Senate made it clear that Congress specifically intended for the federal government to be a party to the IADA, and specifically intended that a Governor's right of refusal would be "preserved." S. Rep. No. 91-1356 & H. Rep. No. 91-1018, 1970 U.S.C.C.A.N. 4865.

*United States v. Mauro* joined two distinct cases wherein the federal courts secured prisoners for federal prosecution; both of the *Mauro* cases involved a writ of habeas corpus *ad prosequendum*, but in different contexts. United States v. Mauro, 436 U.S. 340, 344-47 (1977).

In the first case, no federal court had issued a writ of habeas corpus *ad prosequendum* and no IADA detainer had ever been filed. The Court ruled that the writ was not a detainer within the meaning of the

IADA; therefore, the issuance of the writ did not trigger application of the IADA. *Id*. at 349.

In the second case, the federal government had issued a detainer pursuant to the IADA, and then later attempted to obtain the prisoner via an *ad prosequendum* writ. The Court ruled that the United States was bound by the terms of the IADA once the U.S. issued an IADA detainer; therefore, the post-detainer writ functioned as a request for transfer under the IADA. Thus, the IADA's Time Limit Provision governed how long the United States could wait before bringing the defendant to trial. *Id*. *Mauro* also clarified the rule that the United States is a party to the IADA as both a sending and a receiving state. *Id*. at 354.

The First Circuit misconstrues several key points in *Mauro*. These misinterpretations are accomplished by simple omission, by taking a quote out of context, and by restating a "conclusion" that was never actually established.

- First, the Circuit Court incorrectly concludes that an *ad prosequendum* writ is subject to the IADA's Time Limit Provision, but not to the Refusal Provision.
- Second, the Circuit claims that Governors have *never* had the right of refusal; but there is no evidence to support the claim.

- Finally, the Circuit Court completely misreads *Mauro* by asserting that a habeas corpus writ can be used to compel the state to surrender a prisoner, even though a detainer was already filed.

### A. The Circuit Court incorrectly concludes that a writ is subject to the Time Limit Provision but not to the Refusal Provision.

Attempting to write around *Mauro*, the Circuit Court states, "the [Supreme] 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." United States v. Pleau, 680 F.3d 1, 3 (1st Cir. 2012) (en banc). This is false. *Mauro* never makes any such distinction. To the contrary, the *Mauro* Court expressly ruled that, "Once the Federal Government lodges a detainer against a prisoner with state prison officials, the Agreement [IADA] by its express terms becomes applicable and the United States must comply with its provisions." *Mauro*, 436 U.S. at 361-62. The *Mauro* Court's plain language contradicts the First Circuit's assertion that the *Mauro* Court intended only the Time Limit Provision, but not the Refusal Provision, to apply to the federal government, as a party to the IADA.

### B. The Circuit Court wrongly asserts that Governors have never had the right of refusal.

Discussing the Refusal issue, *Mauro* states:

> 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 reserve previously existing rights of the sending States, not 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 (emphasis added).

The *Mauro* Court was unimpressed by the *federal government's* argument. The argument that left the Supreme Court "unimpressed" is precisely the argument that so impressed the First Circuit that it became the holding in *Pleau*: that the Supremacy Clause compels a State to submit to any federal court writ of habeas corpus *ad prosequendum.*

The final sentence in the block quote above says that the IADA did not augment state authority to dishonor an *ad prosequendum* writ. *Mauro* carefully avoids saying whether States did or did not have

prior authority to dishonor. The Court says that "If" States did not already have such power, the IADA did not give them new power.

The *Mauro* Court did not have to decide the "If" question. The issues in *Mauro* were whether an *ad prosequendum* writ issued by a federal court can be considered either a "detainer" or "request" within the meaning of the IADA. The *Mauro* Court had no need to decide, and did not decide, whether States have always had the authority to dishonor an *ad prosequendum* writ.

The First Circuit entirely misreads *Mauro*, and asserts that *Mauro* declared that States have never had the power to dishonor the writ. 680 F.3d at 3.

### C. The First Circuit reverses the *Mauro* rule that once the federal government files an IADA detainer, the federal government may only seek the prisoner pursuant to the IADA.

The First Circuit failed to adhere to one of *Mauro*'s holdings: once the federal executive branch files a detainer under the IADA, the federal government cannot step outside the IADA by then seeking a writ of habeas corpus *ad prosequendum*: "we hold that the United States is bound by the Agreement [IADA] 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*." 436 U.S. at 349.

Yet according to the First Circuit, "*Mauro* was saying that a habeas writ – even though it followed a detainer – retained its pre-IADA authority to compel a state to surrender a prisoner." 680 F.3d at 3.

The Circuit Court's ruling is novel across circuit and district courts. As Petitioners have pointed out, there is a significant circuit split over how to interpret *Mauro*. Chafee Pet. at 17-25; Pleau Pet. at 25-27. But even taking that into account, in over 600 cases nationwide, the Circuit Court is the first and only court to proffer such a backwards interpretation of *Mauro*. Westlaw flags the Circuit Court's decision in *Pleau* as the "Most Negative" treatment of *Mauro*. Because the IADA is a nationwide compact, intended to provide uniformity in rules for extradition, it is especially important that this Court reverse the First Circuit's misreading of *Mauro*, which essentially defeats the purpose of the IADA.

## III. The Circuit Court misreads legislative history as explicated by *Mauro*.

It is a well-established rule of statutory construction that when there are conflicting federal statutes, the later and more specific statute should control. *See*, *e.g.*, Vimar Seguros v. M/V Sky Reefer, 29 F.3d 727, 732 (1st Cir. 1994). Assuming *arguendo* that there is a conflict between the 1948 habeas corpus statute and the 1970 IADA, the IADA controls. Not

only is the IADA later, it specifically addresses extradition for prosecution, whereas, the 1948 statute only implicitly refers to that subject.

According to the First Circuit, Governors do not have, and have never had, the discretion to dishonor a federal writ of habeas corpus *ad prosequendum*. 680 F.3d at 3. But the House and Senate Judiciary Committee Reports on the IADA show that Congress believed that Governors did have such a pre-existing power to refuse to extradite prisoners who were serving a state sentence, and that the IADA preserves such power:

> The Agreement [IADA] also provides a method whereby prosecuting authorities may secure prisoners serving sentences in other jurisdictions for trial before the expiration of their sentences and before the passage of time has dulled the memory or made witnesses unavailable. However, a Governor's right to refuse to make a prisoner available is preserved. . . .

S. Rep. No. 91-1356 & H. Rep. No. 91-1018, 1970 U.S.C.C.A.N. 4865.

The First Circuit's interpretation makes the IADA a nullity, in terms of federal-state relations. The IADA specifies the responsibilities and powers of the sending and receiving States. The federal government voluntarily joined the IADA, thus agreeing to be bound by its terms both for sending and for receiving. *Mauro* expressly affirms that the IADA controls

the federal government both as a sender and as a receiver. 436 U.S. at 354.

This Court has recently affirmed that States are sovereign and independent, and exhorted them to act on that basis. National Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2603 (2012) (quoting Massachusetts v. Mellon, 262 U.S. 447, 482 (1923)). States must sometimes exercise their sovereign right to "not yield" to federal pressure. *Id.*

The great constitutional principles articulated in *NFIB* are not limited solely to the Spending Clause. Rhode Island has abolished the death penalty. The federal government has filed notice of intention to seek the death penalty in *Pleau*. It is within Governor Chafee's sovereign discretion to exercise his statutory rights under IADA, and his powers as Governor of a sovereign state, because Rhode Island does not support the death penalty.[3]

Contrary to the Circuit Court's bare assertions, there is nothing in the legislative text or history of the IADA to suggest that Congress intended to expand federal power at the expense of state sovereignty. As discussed in Part I, *supra*, nothing in the IADA comes remotely close to meeting the constitutional

[3] The Independence Institute does not oppose the death penalty, and would not object to the execution of Petitioner, if he is found guilty of the capital crime alleged. However, the Institute supports Rhode Island's rights under our system of dual sovereignty, and as that system is safeguarded by the IADA.

requirement for "unmistakably clear" language expressing intent to alter state-federal relations. Gregory v. Ashcroft, 501 U.S. 452, 452 (1991).

## IV. The First Circuit failed to heed *Ponzi*.

This Court's 1922 case of *Ponzi v. Fessenden* reaffirmed the dual sovereignty principles of state/federal court relations recognized by Chief Justice Marshall in *Bollman*. 258 U.S. 254, 255-56 (1922). The Circuit Court brushes past the comity and federalism principles articulated in *Ponzi*. *Pleau*, 680 F.3d at 4. *Ponzi* does not specifically say whether a Governor may dishonor a federal court habeas corpus *ad prosequendum* writ. 258 U.S. at 255-66. But *Ponzi* does provide important teachings which inform a court that must decide the issue, as in the instant case.

In *Ponzi*, a State desired a federal prisoner for state prosecution. *Id.* The United States Attorney General consented to the transfer, but Ponzi himself (the inventor of the Ponzi Scheme), objected. *Id.* The Court ruled that Ponzi had no right to stop the transfer.

The *Ponzi* Court never discussed the issue of gubernatorial refusal, which was not at issue in the case. Chief Justice Taft's opinion of the unanimous Court did discuss general principles of comity and dual federalism, which provide insight into the instant case. As Chief Justice Taft explained, "We live in the jurisdiction of two sovereignties, each having

its own system of courts to declare and enforce its laws in common territory." He stressed the importance of "a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure." *Id*. at 259. The *Ponzi* Court noted that, "These courts [state and federal] 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." *Id.* at 261 (quoting Covell v. Heyman, 111 U.S. 176 (1884)). *Covell* also cites to Chief Justice Marshall to make a point of crucial importance to the *Pleau* case: the jurisdiction of a court over a person or a thing "is not exhausted by the rendition of its judgement, but continues until that judgement shall be satisfied." *Id.* at 182-83, citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 11 (1825).[4] Accordingly, the federal government's seizure

---

[4] The full quote from *Covell* is:

> The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards 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 state courts and those of the United States, it is something more. It is a principle of right and of 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 co-exist 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

(Continued on following page)

of Mr. Pleau violates not only the prerogatives of Rhode Island's executive branch, but also the jurisdiction of the Rhode Island courts, which retain jurisdiction over Pleau until the state court's judgement of imprisonment is fully satisfied.

Contrary to *Ponzi*, *Covell*, and *Ex Parte Bollman*, the First Circuit treated Rhode Island as if the Supremacy Clause turned the State into an inferior cog in the federal court system – rather than what the

---

> 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. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. "The jurisdiction of a court," said Chief Justice Marshall, "is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised." Wayman v. Southard, 10 Wheat. 1.

*Covell* at 182-83.

*Covell* was written for a unanimous Court by Justice Thomas Stanley Matthews. Justice Matthews is best known as the author of Yick Wo v. Hopkins, 118 U.S. 356 (1884). He is remembered as "a craftsman and a realist rather than an ideologue" with a "progressive and pragmatic approach to constitutional law." N.E.H. Hull, *Matthews, Thomas Stanley*, in THE OXFORD COMPANION TO THE SUPREME COURT 618 (Kermit L. Hall ed., 2d ed. 2005). In other words, Justice Matthews was no hardliner on States' Rights, and he was a leader in support for strong federal civil rights powers.

State of Rhode Island and Providence Plantations really is: a separate and independent sovereign. *Ponzi* is very clear that federal and state courts are co-equals and that the federal court is not superior. Accordingly, a federal court writ does not necessarily have absolute power to compel sovereign state officers. The First Circuit's judicial invention of such absolute federal power seriously damages our constitutional structure of dual sovereignty.

*Ponzi*'s teachings apply to the instant case:

> 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.

*Ponzi*, 258 U.S. at 260.

Rhode Island had custody of Mr. Pleau long before a U.S. Attorney ever sought a federal writ. Rhode Island has not exhausted its remedy; rather, Rhode Island is imprisoning Mr. Pleau for a parole violation. But for the interference of the U.S. Attorney, Pleau would already be serving a Rhode Island life sentence without parole for the crime for which the U.S. Attorney wants to try him.

## CONCLUSION

This Court should grant the petition for a writ of certiorari, and the Question Presented should address our constitutional system of dual sovereignty.

Respectfully submitted,

DAVID B. KOPEL

*Counsel of Record for Amici Curiae*
THE INDEPENDENCE INSTITUTE
727 E. 16th Ave.
Denver, CO 80203
(303) 279-6536 ext. 112

ILYA SHAPIRO
TIMOTHY LYNCH
THE CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200

September 26, 2012