No. 12-223

IN THE

Supreme Court of the United States

LINCOLN CHAFEE, IN HIS CAPACITY AS THE GOVERNOR OF THE STATE OF RHODE ISLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL GOVERNORS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL CONFERENCE OF STATE LEGISLATURES IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici are three national bipartisan organizations that collectively represent the nation's elected and appointed state officials. The Council of State Governments represents all three branches of state government and all elected and appointed state officials. Since its founding in 1933, the Council of State Governments has facilitated the development of numerous interstate compacts. As discussed in *United States v. Mauro*, 436 U.S. 340, 350-51, 360-62 & n.28 (1978), the Council of State Governments played an integral role in drafting the Interstate Agreement on Detainers Act ("IAD" or the "Agreement"), 18 U.S.C. app.2, and also ensured that jurisdictions throughout the country adopted it. The National Governors Association acts as the collective voice of the nation's governors on issues of national policy, and allows the governors collectively to address matters of public policy and governance at the state and national levels. The National Conference of State Legislatures represents state legislators and legislative staff, and provides state legislatures with a cohesive voice in the federal system.

As representatives of the nation's state governments, the *amici* have a compelling interest in ensuring that the carefully bargained-for terms of interstate compacts are enforced as written against all signatories, including the federal government.[1]

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1. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. And no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing

SUMMARY OF THE ARGUMENT

Before the First Circuit's en banc decision, states understood that compacts involving states and the federal government as parties were fully enforceable against all signatories. The First Circuit's decision has shattered that understanding.

The First Circuit, in *United States v. Pleau*, 680 F.3d 1 (1st Cir. 2012), held that a provision of a *federal* statute (the IAD), duly enacted by Congress and whose plain meaning is not in doubt, was nullified based on the Supremacy Clause. Its holding invalidated the part of the IAD that protected the right of a state to veto the federal government's request for the transfer of custody of a state prisoner. The First Circuit's reliance on the Supremacy Clause was unfounded because the conflict at issue was not between a federal statute and a state statute, but instead between two federal statutes (i.e., the IAD and 28 U.S.C. § 2241). No state law was implicated. The proper resolution of this conflict therefore would have been either for (1) Congress to amend the IAD or (2) the First Circuit to hold that the executive branch must abide by the IAD's unambiguous terms.[2] Neither of these things happened here.

If the portion of the IAD protecting states' rights vis-à-vis the federal government, and by extension any federal

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or submitting this brief. The parties have consented to the filing of this brief and such consents are submitted herewith.

2. The Solicitor General's office, which has a duty to defend the constitutionality of federal statutes struck down in lower courts, did not voluntarily file a brief defending the constitutionality of the IAD.

statute, can be held unconstitutional under the Supremacy Clause, states will approach the entire framework of state-federal compacts with far greater apprehension and uncertainty—thereby undermining the important function of such compacts in our federal system. As one federal appellate court has recognized, "even a suspicion of . . . potential impermanency would be damaging to the very concept of interstate compacts." *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962). Because of the enormous and wide-ranging impact of the First Circuit's ruling, this Court should grant certiorari review in this case and settle the uncertainty hovering over all current and future compacts.

The IAD was carefully negotiated among the states and the federal government and enacted into federal law in 1970. The parties to the compact agreed that the governor of the sending jurisdiction (or in the case of the federal government, the Attorney General) can disapprove a request for a prisoner's transfer. *See* IAD § 2, art. IV(a). Congress accepted this provision and did not carve out special protections for the federal government—as it has commonly done in other compacts, and as it has done for other provisions of the IAD itself—to prevent a gubernatorial veto when the federal government is the requesting jurisdiction. Here, however, faced with Rhode Island Governor Lincoln Chafee's exercise of this veto right under the IAD, the executive branch of the federal government has sought to override his gubernatorial veto—not through the terms of the statute itself, but through invocation of a previously enacted federal statute.

A denial of certiorari review here would have enormous negative consequences. Grave uncertainty now

exists over existing and future compacts as a result of the First Circuit's refusal to require the federal government to abide by the terms of its longstanding agreement with the states. This Court should declare that the federal government cannot contract with the states but unilaterally ignore the terms of its agreement with the states when faced with an undesirable outcome. Until this issue is resolved, the relationship between the states and the federal government in various compacts will remain uncertain.

ARGUMENT

I. THE FIRST CIRCUIT FAILED TO RECOGNIZE THAT THE IAD, LIKE OTHER COMPACTS, IS A CONTRACT THAT OFFERS BENEFITS IN EXCHANGE FOR OBLIGATIONS

A. The Federal Government Is an Active Participant in Interstate Compacts

The IAD is an interstate compact entered into by 48 states and the federal government through an act of Congress. Like other interstate compacts, the IAD is a distinctly American solution to the challenges created by "two sets of legal authorities—the individual States and the United States—with their respective fields of action not definitively delimited by law and yet constantly interacting in fact, particularly in crucial legislative areas." Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L.J. 685, 687 (1925). As this Court has recognized, interstate compacts represent compromises between "discrete sovereigns"—the "States and the Federal Government"—that address "interests that may be badly

served or not served at all by the ordinary channels of National or State political action." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (internal quotation omitted).

The role of interstate compacts in the federal system can be traced to the adoption of the Compact Clause of the Constitution, which provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." U.S. Const. art. 1, § 10. Since the early 20th century, interstate compacts have grown in number and in scope to become integral tools that "provide the machinery for continuous joint regulation of [] regional problem[s]." Frank P. Grad, *Federal State-Compact: A New Experiment in Co-Operative Federalism*, 63 Colum. L. Rev. 825, 834 (1963).

While not a named party to the earliest interstate compacts, Congress addressed the national interest in such arrangements through its power of consent, which it could withhold or attach conditions to. *See Cuyler v. Adams*, 449 U.S. 433, 439-40 (1981). As this Court has made clear, "[b]y vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Id.*

The federal government's full and direct membership in interstate compacts—that is, where the United States itself is a party—began in 1961 when the Delaware River Basin Compact was created and signed into federal law. *See* 75 Stat. 688 (1961); Grad, *Federal-State Compact*, at

825. The signatories to the Delaware River Basin Compact included Delaware, New Jersey, New York, Pennsylvania, and the United States—all as coequal parties. As the first interstate compact with full federal participation, the Delaware River Basin Compact "represent[ed] a new step in federal-state relations, and mark[ed] a potentially far-reaching advance in co-operative federalism." Grad, *Federal-State Compact*, at 825.

There are now over 200 interstate compacts in operation. The federal government either directly participates or has provided its consent in many of these compacts.[3] The IAD is therefore one of a large number of interstate compacts—which address subject matters as diverse as criminal law, energy, and sanitation—that affect both interstate and state-federal interests.[4]

B. The Federal Government Entered Into the IAD as an Equal Party With the States

In 1957, when *amicus* the Council of State Governments recommended that jurisdictions throughout the country enact an agreement on detainers, the IAD already had been reviewed and approved by a conference of the American Correctional Association, the Council of State Governments, the National Probation and Parole

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3. *See* Council of State Governments, *National Center for Interstate Compacts Database*, http://apps.csg.org/ncic/.

4. *See* Interstate Corrections Compact, http://apps.csg.org/ncic/PDF/Interstate% 20Corrections%20Compact.pdf; Interstate Compact to Conserve Oil and Gas, http://www.iogcc.state.ok.us/charter; Ohio River Valley Water Sanitation Compact, http://www.orsanco.org/orsanco-compact.

Association, and the New York Joint Legislative Committee on Interstate Cooperation. *See United States v. Mauro*, 436 U.S. 340, 350 (1978). Representatives of the United States Department of Justice also were present at the conference. *Id.* The IAD was intended to be an "interjurisdictional" tool—applying to both state and federal governments—which provided certain benefits and protections both to members of the IAD and to prisoners within those member states. *See* Council of State Governments, *Suggested State Legislation Program for 1957*, at 78 (1956). The Council of State Governments noted that if the United States chose to become a party to the IAD, "the procedures provided in the agreement will be available on both an interstate and a federal-state level." *Id.* In 1970, at the urging of the Attorney General, Congress enacted the Interstate Agreement on Detainers Act, 18 U.S.C. app. 2, which joined the United States with what is now 48 other States as a full and equal member to the Agreement.

Once approved by Congress, the IAD became federal law. *See Cuyler*, 449 U.S. at 438. "Just as if a court were addressing a federal statute, then, the first and last order of business of a court addressing an approved interstate compact is interpreting the compact." *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (internal quotation marks omitted); *see also Alabama v. North Carolina*, 130 S. Ct. 2295, 2312 (2012) (noting that "an interstate compact is not just a contract; it is a federal statute enacted by Congress . . . [and courts] do not—we cannot—add provisions to a federal statute"). There is no room for a court to interpose its own "common sense" judgment of a compact—as the First Circuit did with the IAD—when the ordered relief is "inconsistent with [the compact's] express terms, no matter what the equities of the circumstances

might otherwise invite." *New Jersey*, 523 U.S. at 811 (citation omitted). Compacts, similar to contracts, must be interpreted consistently with the expectation of the parties that signed them. *See Entergy, Arkansas, Inc. v. Nebraska*, 241 F.3d 979 (8th Cir. 2001); *see also* Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269, 286 (1986) ("[A] system in which judges may . . . second-guess the wisdom of the parties may create more substantive unfairness than it cures.").

To obtain the benefits of interstate compacts like the IAD, the federal government, like all sovereigns, "surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law." *C.T. Hellmuth & Assocs., Inc., v. Washington Metro. Area Transit Auth.*, 414 F. Supp. 408, 409 (D. Md. 1976). Once enacted, "a compact . . . may not be amended, modified, or otherwise altered without the consent of all parties." *Id.*

The federal government's direct participation in compacts represents a political compromise in which the federal government incurs certain contractual obligations in exchange for obtaining corresponding contractual benefits. There are many examples of this form of political compromise. For example, under the terms of the National Crime Prevention and Privacy Compact Act of 1998, Pub. L. No. 105-251, 112 Stat. 1874 (1998) (codified at 42 U.S.C. §§ 14611-14616), the federal government must provide information to the states on individuals' criminal history records (an obligation) but in exchange receives information from states to streamline its licensing and employment background-check responsibilities (a benefit).

The federal government's direct membership in interstate compacts underscores that these compacts are necessary and important in addressing significant national concerns. *Cf. Hess.*, 513 U.S. at 40 (stating that Congressional consent to a compact is a "means of safeguarding the national interest") (citation omitted).

C. The Federal Government Could Have, But Did Not, Exempt Itself From the Disapproval Provision of the IAD

After the Supreme Court held in *Mauro* that the United States was a fully bound member to the IAD, Congress amended the IAD in 1988 to treat the United States differently from states in two instances. Notably, however, *neither instance* involved a governor's right to deny a request for transfer. The United States has also carefully crafted exemptions for itself in other compacts.[5] If compromise was not possible, any party to the IAD could have declined to sign the Agreement, as two states (Louisiana and Mississippi) have done. Finally, the IAD

5. *See, e.g.*, Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961), Article 15 ("Reservations") ("[N]othing contained in this Act or in the Compact shall be construed as superseding or limiting the functions, under any other law, . . . of any [ ] officer or agency of the United States, relating to water pollution"); Susquehanna River Basin Compact, Pub. L. No. 91-575, 84 Stat. 1509 (1970), Part II ("Reservations of the United States"); National Crime Prevention and Privacy Compact Act (NCPPCA), Pub. L. No. 105-251, §§ 211-217, 112 Stat. 1874 (1998) (codified at 42 U.S.C. §§ 14611-14616), 42 U.S.C. § 14614 (providing that nothing in the compact "shall affect the obligations and responsibilities of the FBI" with respect to the Privacy Act of 1974, or "interfere in any manner with" other specified federal laws).

is triggered only by the filing of a detainer, so any party wishing to avoid its provisions could abstain from filing a detainer with the state where the prisoner is held.

Already armed with these options to avoid a gubernatorial veto, the federal government was granted yet another alternative by the First Circuit here. The First Circuit's holding essentially provides the federal government a free pass to ignore the IAD's terms at its whim. The First Circuit effectively declared that one party to the IAD, or any compact for that matter, is superior and no longer equally bound by its terms, notwithstanding the undisputed fact that by its terms the IAD treats all parties as equals. As the en banc dissent recognized, "[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." *Pleau*, 680 F.3d at 18 (Torruella, J., dissenting).

The First Circuit's ruling threatens to undermine the entire system of interstate compacts. In the First Circuit's view, compacts are not agreements binding their signatories but merely serve as a suggestion of how at least one signatory should behave. This interpretation of the IAD, in which the federal government is "free to disregard those other parts of Article IV(a) that it now finds inconvenient to follow[,] . . . is not only unwarranted and unprecedented, but borrowing from the majority, 'fails the test of common sense.'" *Id.* It is not what the states signed up for and it defies this Court's decree that a court's preferred terms cannot be judicially engrafted into a compact, "given the federalism and separation-of-powers concerns" that arise from judicial "rewrit[ing]

of an agreement among sovereign States, to which the political branches consented." *Alabama*, 130 S. Ct. at 2312-13.

II. THE FIRST CIRCUIT'S DECISION HAS CAST A CLOUD OVER INTERSTATE COMPACTS

The First Circuit concluded that the IAD's gubernatorial veto provision does not apply to the federal government because, in light of the Supremacy Clause, "[o]ne can hardly imagine Congress" passing a federal statute empowering a state governor to veto a federal request for custody of a state prisoner. *See Pleau*, 680 F.3d at 7. This is not a matter of imagination. There is no dispute that Congress expressly provided precisely that right to state governors. *See* IAD § 2, art. IV(a). The court's holding that a federal statute giving rights to state governors is unconstitutional exacerbates an existing circuit split (*see* Gov. Chafee's Petition for a Writ of Certiorari dated August 21, 2012, at 17) and created uncertainty in interpretation of the IAD and other compacts.

In the realm of interstate compacts, any disagreement between the circuits is serious. By their very nature, interstate compacts involve multiple states governed by the law of multiple circuits, and states need certainty in how compacts will be interpreted in *all* circuits. The uncertainty as to which law will apply to a single party—the United States—depending on which circuit is involved threatens the integrity of the entire system of interstate compacts. Without a clear resolution, it will be impossible to predict which law will be applied if, for example, New York (Second Circuit) and Massachusetts (First Circuit) want to enter into a compact with the United States.

Adding to this uncertainty is the conflict between the First Circuit's ruling here and the longstanding rule that the United States, like any party, must abide by its contractual obligations. *See Mobil Oil Exploration & Producing Southeast v. United States*, 530 U.S. 604, 607 (2000) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (citation omitted)); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

The federal government's attempt to use the Supremacy Clause as an end run around the IAD, if allowed to stand, will have a drastic impact on both the IAD specifically and compacts generally. First, permitting the United States to flout its obligations under the federally enacted IAD by invoking the supremacy of another federal law will improperly shift the balance of power under the IAD to the federal government. That was not contemplated when the IAD was negotiated and enacted. Rather, the IAD explicitly defines a "State" as *any state or the United States*—that is, they are defined by the IAD's terms as equals. The coequal status of states and the federal government under the IAD is buttressed by the corresponding benefits and obligations negotiated among all parties to the IAD. Specifically, all members of the IAD are guaranteed, among other things, simple, fast, and assured detention of defendants in custody in other jurisdictions in exchange for, among other things, permitting the sending state 30 days to consider disapproving a request. *See* IAD § 2, art. IV(a). Granting the federal government permission to ignore such a disapproval would drastically tilt the IAD in the federal government's favor and cripple it as a functioning and effective bilateral compact.

Second, the federal government's claim that the Supremacy Clause exempts it from complying with its bargained-for obligations under the IAD will have a dramatic impact on the legitimacy of other existing compacts. For this very reason, the federal government has not previously been permitted, absent an amendment of federal law or a specific reservation of rights, to impose additional obligations on states after a compact has been signed into law. *See McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991) ("Having entered into a contract, a participant state may not unilaterally change its terms."); *Cuyler*, 449 U.S. at 439-40. The Court of Appeals for the District of Columbia Circuit has previously expressed this exact concern. *Tobin*, 306 F.2d at (noting that an alteration to terms of a compact "would stir up an *air of uncertainty* in those areas of our national life presently affected by the existence of these compacts. No doubt *the suspicion of even potential impermanency would be damaging to the very concept of interstate compacts*.") (emphases added).[6]

Third, a refusal by the Court to grant certiorari review here would amount to implicit approval of the United States' end run around the IAD, and would undoubtedly result in serious reservations among the states about entry into future compacts. States reasonably would doubt whether they will obtain what they are bargaining for, or whether the federal government will later impose additional obligations or take additional benefits when a compact's terms become undesirable or unfavorable to it. Certainly, no commercial actor would enter a contract in

6. It is notable that the court in *Tobin* was referring to a situation where Congress merely alters, amends, or repeals its *consent* to a compact—not where the United States itself is a party.

which it believed that the terms could be changed, ignored, or avoided unilaterally at another party's whim. The same holds true for political actors like states.

CONCLUSION

To preserve this important interjurisdictional tool of federalism and restore certainty to the network of compacts that the federal government has signed its name to, this Court must hold the federal government, like all parties, to its bargain. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: September 21, 2012

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