Nos. 12-223 and 12-230

In the Supreme Court of the United States

LINCOLN D. CHAFEE, GOVERNOR OF RHODE ISLAND, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

JASON WAYNE PLEAU, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Agreement on Detainers, 18 U.S.C. App. 2, permits the governor of a State to refuse to comply with a writ of habeas corpus *ad prosequendum* issued by a federal court to obtain custody of a state inmate facing federal criminal charges.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-47a) is reported at 680 F.3d 1.[1] The opinion of the district court (Pet. App. 83a-91a) is not published in the *Federal Supplement* but is available at 2011 WL 2605301.

[1] All citations to "Pet. App." are to the appendix in No. 12-223.

JURISDICTION

The judgment of the en banc court of appeals was entered on May 7, 2012. On July 27 and July 30, 2012, Justice Breyer extended the time within which to file petitions for a writ of certiorari to and including August 21, 2012, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Jason Pleau, petitioner in No. 12-230, robbed and murdered David Main on the steps of a federally insured bank in Rhode Island. A federal grand jury in the District of Rhode Island indicted Pleau on charges relating to the robbery and murder, including an offense punishable by death. See 18 U.S.C. 924(c)(1)(A) and (j)(1); Pet. App. 3a-4a. At the time of the indictment, Pleau was in Rhode Island's custody, facing charges of probation and parole violations. Pet. App. 4a. The United States lodged a detainer against Pleau and then sought custody of him from Rhode Island authorities by filing a written request under the Interstate Agreement on Detainers Act (IAD), Pub. L. No. 91-538, 84 Stat. 1397 (18 U.S.C. App. 2). Pet. App. 4a, 121a. Invoking Article IV(a) of the IAD, Lincoln Chafee, the Governor of Rhode Island and petitioner in No. 12-223, refused the request based on his opposition to capital punishment. *Id.* at 132a-135a. The United States then sought custody of Pleau by asking the federal district court to issue a writ of habeas corpus *ad prosequendum*. *Id.* at 4a-5a. The district court granted the writ and ordered Pleau's state custodian to deliver Pleau to the United States to answer the federal charges. *Id.* at 5a.

Pleau sought to block his transfer, and the First Circuit stayed the habeas writ pending review. Pet. App.

5a. Following oral argument, a panel granted the Governor's motion to intervene and issued a writ of prohibition barring the district court from enforcing the habeas writ. See *ibid.* On rehearing en banc, the court of appeals denied the writ of prohibition. See *ibid.* The en banc court, and then this Court, subsequently denied petitioners' motion to stay the mandate. *Id.* at 92a; No. 11A1113 Docket entry (May 24, 2012). Following issuance of the mandate, the district court issued a new habeas writ, which the Governor honored; the United States took custody of Pleau and he was arraigned on the federal charges.

1. a. Since the Judiciary Act of 1789, federal courts have had the power to issue "writs of * * * *habeas corpus*." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), Chief Justice Marshall explained that "habeas corpus" is "a generic term" that includes the writ of habeas corpus "[*a*]*d prosequendum*," a writ used to secure the physical presence at trial of a person held in the custody of another jurisdiction. See *id.* at 93-94, 97-98; see also, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 n.2 (1973); 3 William Blackstone, *Commentaries on the Laws of England* *130 (1765-1769). Today, federal courts have authority to issue the *ad prosequendum* writ pursuant to 28 U.S.C. 2241(c)(5), which provides that the writ of habeas corpus "extend[s] to a prisoner" when "[i]t is necessary to bring him into court to testify or for trial." See *Carbo* v. *United States*, 364 U.S. 611, 615-618 (1961).

b. In 1970, the IAD, a congressionally sanctioned interstate compact, became federal law. See *Cuyler* v. *Adams*, 449 U.S. 433, 438-442 (1981). The IAD seeks to "encourage the expeditious and orderly disposition of [outstanding] charges" against a defendant from multi-

ple jurisdictions, 18 U.S.C. App. 2, Art. I, and to "provide cooperative procedures among member States to facilitate such disposition," *United States* v. *Mauro*, 436 U.S. 340, 351 (1978). The IAD's procedures are triggered by the act of lodging and executing a detainer, a "formal notification" from a state seeking custody of a prisoner (the receiving state) to the state holding the prisoner (the sending state) "that the prisoner is wanted for prosecution in another jurisdiction." *United States* v. *Kenaan*, 557 F.2d 912, 915 (1st Cir. 1977), cert. denied, 436 U.S. 943 (1978); see *Alabama* v. *Bozeman*, 533 U.S. 146, 148 (2001).

Article IV of the IAD gives "the jurisdiction in which an untried indictment, information, or complaint is pending" the right "to have a prisoner against whom" it "has lodged a detainer * * * made available" for trial. 18 U.S.C. App. 2, Art. IV(a). The receiving state can invoke this right by filing a "written request for temporary custody." *Ibid.*; see also 18 U.S.C. App. 2, Art. V (specifying various requirements for issuing such a request). Article IV(a) provides that "there shall be a period of thirty days after receipt by the appropriate authorities before the request [for temporary custody] 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." 18 U.S.C. App. 2, Art. IV(a).[2]

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[2] Once the prisoner arrives in the receiving state, trial must begin "within one hundred and twenty days" (unless that period is extended for "good cause"). 18 U.S.C. App. 2, Art. IV(c); see *Bozeman*, 533 U.S. at 148 (discussing Article IV's "anti-shuttling" provision); *Reed* v. *Farley*, 512 U.S. 339, 341-342 (1994). A prisoner against whom a detainer has been lodged also has the right to affirmatively "request"

In *United States* v. *Mauro*, 436 U.S. 340 (1978), this Court held that the federal government is a party to the IAD both as a sending state and as a receiving state. See *id.* at 353-356. The Court explained that the IAD is inapplicable if the United States seeks to secure custody of a state prisoner by filing a writ of habeas corpus without ever lodging a detainer. See *ibid.* If the United States first lodges a detainer and then obtains a writ of habeas corpus, however, the writ is treated as a "written request for temporary custody" within the meaning of the IAD. *Id.* at 357-364.

The Court also explained how Article IV(a) functions in cases in which the habeas writ has issued and the IAD applies. The Court stated that "[t]he proviso of Art. IV(a)" discussing a governor's disapproval of transfer "does not purport to augment the State's authority to dishonor * * * a [federal habeas] 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." *Mauro*, 436 U.S. at 363 (footnote omitted).

2. On September 20, 2010, 49-year-old David Main drove to Citizens Bank, a federally insured bank in Woonsocket, Rhode Island, to deposit $12,542 in receipts from the gas station he managed. See Indictment 2-3, 6. As Main began walking to the bank's entrance, Pleau approached Main, pointed a .38-caliber revolver at him, and demanded that he turn over the money. When

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a "final disposition" of charges against him and a speedy trial. 18 U.S.C. App. 2, Art. III(a) and (d); see *New York* v. *Hill*, 528 U.S. 110, 111-112 (2000).

Main attempted to flee into the bank, Pleau fired the gun several times, shooting Main in the head and killing him. Pleau then grabbed the money and fled with the help of several confederates. See *id.* at 6-7.

Pleau was subsequently arrested on a state warrant. At the time of the robbery and murder, Pleau was on probation and parole as a result of several prior convictions for armed robbery. Pet. App. 4a. A state judge ordered Pleau to serve 18 years in prison for probation and parole violations. *Ibid.*

3. a. On November 18, 2010, the United States filed a criminal complaint against Pleau in the United States District Court for the District of Rhode Island, charging him with offenses relating to the robbery and murder. Pet. App. 51a. A magistrate judge issued a warrant for his arrest, and the United States Marshal's Service lodged a detainer with the state prison officials who had custody of him. *Id.* at 51a, 121a-126a.

On December 14, 2010, a federal grand jury in the District of Rhode Island returned a three-count indictment charging Pleau with Hobbs Act robbery conspiracy, in violation of 18 U.S.C. 1951(a); Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and possessing, using, carrying, and discharging a firearm during and in relation to a crime of violence with death resulting, in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1, 7-9. The indictment alleged that Pleau caused Main's death through the use of a firearm under circumstances constituting murder, see *id.* at 9, and included a notice of special findings establishing Pleau's eligibility for the death penalty, see *id.* at 10-11; 18 U.S.C. 3591, 3592.

Several months later, prosecutors in the U.S. Attorney's Office for the District of Rhode Island filed a written request under the IAD seeking temporary custody

of Pleau. Pet. App. 128a-131a. On May 22, 2011, the district court certified the request. *Id.* at 130a. Meanwhile, Pleau told Rhode Island authorities that he was "willing to take a Life Without Parole sentence" from the state. *Id.* at 127a; see *id.* at 13a-14a & n.5. On June 23, 2011, Governor Lincoln Chafee sent a letter to the U.S. Attorney purporting to "disapprove" the custody request under Article IV(a) of the IAD. *Id.* at 132a. In a separate written statement, the Governor explained that this disapproval was based on his belief that he could not "in good conscience voluntarily expose a Rhode Island citizen to a potential death penalty prosecution." *Id.* at 134a; see *id.* at 86a n.1.

Pleau thus remained in state custody. On June 27, 2011, the United States applied to the United States District Court for the District of Rhode Island for a writ of habeas corpus *ad prosequendum* requiring Pleau's custodian to produce him for arraignment on the federal indictment. Pet. App. 136a-137a; see also *Kenaan*, 557 F.2d at 915 (describing the IAD's request procedure and an *ad prosequendum* writ as "distinct avenues for obtaining custody of prisoners for federal prosecution"). Pleau objected.

On June 30, 2011, the district court granted the government's application. Pet. App. 83a-91a. The court concluded that "a state prisoner is *without standing* to contest a federal court's issuance of a writ of habeas corpus *ad prosequendum*." *Id.* at 87a (quoting *Derengowski* v. *United States Marshal*, 377 F.2d 223, 223 (8th Cir.), cert. denied, 389 U.S. 884 (1967)). The court also addressed the merits, relying on this Court's decision in *Mauro* to conclude that "the proviso in Article IV allowing a governor 30 days to refuse a request for temporary custody under the IAD[] does not, and could not, confer

upon a governor the authority to dishonor a federal court's writ of habeas corpus *ad prosequendum*." *Id.* at 89a; see *id.* at 90a ("[T]here can be no question that a State's dishonoring of a federal writ violates the Supremacy Clause.").

b. Pleau appealed and also asked the court of appeals for a writ of prohibition—a form of mandamus prohibiting action by a lower court, see Pet. App. 6a, 54a-55a—to block the habeas writ. *United States* v. *Pleau*, No. 11-1775 (1st Cir.); *In re Pleau*, No. 11-1782 (1st Cir.). Over a dissent by Judge Boudin, the court of appeals issued a stay while it considered whether to grant the writ of prohibition. 7/7/11 C.A. Order. The court also permitted the Governor to appear as an amicus. After the completion of full briefing and oral argument, the Governor moved to intervene in the appellate proceedings as a party, and the court granted the motion. 8/1/11 C.A. Order.

On October 13, 2011, in a decision by Judge Torruella (joined by Judge Thompson), a divided panel issued a writ of prohibition. Pet. App. 49a, 74a. After bypassing Pleau's standing and various other jurisdictional difficulties on the ground that the court of appeals had the power to consider a request for prohibition by the Governor, *id.* at 54a-62a, the panel framed the question as whether "an *ad prosequendum* writ that post-dates the invocation of the IAD is, under federal law, treated as" a "written request" to which Article IV(a) of the IAD applies. *Id.* at 63a; see *ibid.* (finding no "free-standing right to ignore federal *ad prosequendum* writs" independent of Article IV(a)). The panel answered yes, reading *Mauro* to establish that "once [the United States] has invoked the IAD, it is bound by the terms thereof, including Article IV(a)." *Id.* at 65a; see *id.* at

64a, 66a. The panel determined that the United States was therefore bound by "Governor Chafee's exercise of his right of refusal enshrined in Article IV(a) of the IAD." *Id.* at 74a.

Judge Boudin dissented. He observed that "Congress would surely be surprised to be told that it had empowered a state governor to veto a federal court habeas writ—designed to bring a federally indicted prisoner to federal court for trial on federal charges—because the governor opposed the penalty that might be imposed if a federal conviction resulted." Pet. App. 75a. In his view, *Mauro* "expressly reject[ed] the suggestion that a state governor could resist a writ of habeas corpus by withholding consent to the transfer of a state prisoner to federal court." *Id.* at 79a, 81a.

The United States filed a petition for rehearing en banc. The court of appeals granted the petition, withdrew the panel opinion, and denied the writ of prohibition in an en banc opinion authored by Judge Boudin. Pet. App. 1a-47a, 102a.

The en banc court analyzed *Mauro* closely. As the court explained, "in saying that state authority to withhold the prisoner was not augmented beyond whatever had existed before the IAD, *Mauro* was saying that a habeas writ—even though it followed a detainer—retained its pre-IAD authority to compel a state to surrender a prisoner." Pet. App. 9a. The court noted that this interpretation of the IAD was "borne out" by the history of Article IV(a) as merely preserving rules governing extradition from one state to another. *Id.* at 9a-10a (stating that "the federal government * * * proceeded prior to the IAD not by extradition but by use of habeas"). And the court concluded that it was "patent" that the "states have always lacked th[e] authority" to

dishonor a habeas writ, since "[u]nder the Supremacy Clause, * * * the habeas statute—like any other valid federal measure—overrides any contrary position or preference of the state." *Id.* at 10a, 13a (citing, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 18-19 (1958)); see *id.* at 10a-11a (dismissing on various grounds a "miscellany of old circuit-court statements that a demand by a federal court for a state prisoner depends upon comity"). The court noted that various other circuits had agreed with this conclusion, and characterized a contrary statement in *United States* v. *Scheer*, 729 F.2d 164 (2d Cir. 1984), as "dictum." Pet. App. 12a.[3] Judge Torruella (joined by Judge Thompson) dissented. *Id.* at 14a-47a.

4. Following the en banc decision, the United States filed a motion for immediate issuance of the mandate and petitioners filed a motion to stay the mandate. The court of appeals denied both motions. Pet. App. 93a-96a. Petitioners then applied to this Court for a stay of the mandate; Justice Breyer denied the application (11A1113 Docket entry (May 24, 2012)). The mandate issued on May 29, 2012. 5/29/12 C.A. Order; see Pet. App. 93a.

Later that day, the district court issued a new writ of habeas corpus *ad prosequendum* directing that Pleau be transferred to federal custody for arraignment. Pet. App. 138a-139a. Rhode Island officials promptly complied with the writ, the United States received custody of Pleau, and he was arraigned as scheduled. On June 18, 2012, the United States filed a notice in the district court of its intention to seek the death penalty against

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[3] The en banc court also noted the existence of various procedural issues, including Pleau's "debatable standing," the difficulties that would be involved in "rescu[ing]" Pleau's interlocutory appeal, and the Governor's "belated intervention." Pet. App. 5a-6a.

Pleau if he is convicted of the capital offense charged in the indictment. *Id.* at 140a-147a. Proceedings in the district court are ongoing, and trial is scheduled for 2013. 1:10-CR-184 Docket entry No. 129, at 3 (D.R.I. July 30, 2012).

ARGUMENT

Petitioners seek review of the denial of a writ of prohibition that would have barred the United States from enforcing a validly issued writ of habeas corpus *ad prosequendum*; they argue that the IAD gives Rhode Island's governor the power to defy an order from a federal court based on the governor's opposition to a penalty that federal law authorizes the court to impose. The First Circuit's rejection of that argument was dictated by this Court's decision in *United States* v. *Mauro*, 436 U.S. 340 (1978), and does not conflict with the decision of any other court of appeals. In addition, no reason exists for this Court to revisit the issue that *Mauro* resolved: the issue rarely arises, procedural hurdles block the path to reaching the issue here, and a contrary resolution would not aid state prisoners charged with federal crimes in resisting transfer of custody to the United States. Accordingly, further review is not warranted.

1. a. This Court's decision in *Mauro* establishes that nothing in the IAD impliedly repeals, modifies, or supplants the federal *ad prosequendum* writ or otherwise purports to give a state governor the power to disapprove a federal court order. The en banc court of appeals therefore correctly declined to grant the "drastic remedy" of a "discretionary" writ of prohibition. Pet. App. 55a, 62a (citation omitted).

In *Mauro*, federal officials lodged a detainer against a state prisoner and subsequently obtained custody of

him by means of a writ of habeas corpus *ad prosequendum*. See 436 U.S. at 345-346. When the prisoner was not brought to trial within the time limit specified by IAD Article IV(c), he sought dismissal of the indictment. See *id.* at 347. The United States argued that the habeas writ was not subject to Article IV, which contains the disapproval language on which petitioners rely, "[b]ecause a writ of habeas corpus *ad prosequendum* is a federal-court order" and "it would be contrary to the Supremacy Clause * * * to permit a State to refuse to obey it." *Id.* at 363. The Court found the Article IV time limit applicable when the federal government invokes the IAD by filing a detainer, but gave the disapproval language in Article IV(a) a limited interpretation that avoided conflict with federal courts' habeas authority. See *ibid.* The Court explained:

> The proviso of Art. IV(a) does not purport to augment the State's authority to dishonor such a [habeas] 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. Accordingly, we do not view the provision as being inconsistent with the inclusion of writs of habeas corpus *ad prosequendum* within the meaning of written requests.

Ibid. (footnote and internal quotation marks omitted).

The import of that statement is clear: this Court held that Article IV(a) of the IAD confers no right of refusal on a state governor that he would not have had before the IAD was enacted. Petitioner Pleau asserts (12-230 Pet. 22-23) that the key passage in *Mauro* refers to the

fact that the IAD did not bind the federal government until Congress adopted the compact in 1970. That is not a reasonable interpretation of the opinion. This Court was considering an argument about the effect of the IAD on the federal government precisely because the United States was bound by the compact, and the Court did not place any temporal limitation on the conclusion that Article IV(a) "could not be read as providing" authority to dishonor a habeas writ issued by a federal court. 436 U.S. at 363. Indeed, if the Court were addressing only the IAD before Congress enacted it as federal law, the decision would have failed to address the government's concern that a state might assert power under the IAD to defy a writ *ad prosequendum*. *Ibid.* The Court's holding plainly rejected any possibility that the IAD could be interpreted to empower a state to reject a federal writ.

That conclusion accords with basic principles of statutory interpretation. Were Article IV(a) given any greater force, it would impliedly repeal portions of the federal habeas statute with roots stretching back to 1789. Such implied repeals are disfavored, see *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936), and not even the "slightest" indication exists here that Congress intended its adoption of the IAD to have such a far-reaching effect, *United States* v. *Kenaan*, 557 F.3d 912, 917 (1st Cir. 1977), cert. denied, 436 U.S. 943 (1978); see *ibid.* (stating that the "presumption against implied repeal" is "even stronger" because of "the long history of the writ as a part of our legal framework").

Indeed, all indications are to the contrary. As *Mauro* noted, the legislative history states that the IAD was intended only to "preserve[]" any rights already pos-

sessed by state governors. *Mauro*, 436 U.S. at 363 n.28 (quoting H.R. Rep. No. 1018, 91st Cong., 2d Sess. 2 (1970), and S. Rep. No. 1356, 91st Cong., 2d Sess. 2 (1970), and citing Council of State Governments, *Suggested State Legislation Program for 1957*, at 78 (1956)); see *id.* at 367 (Rehnquist, J., dissenting) (citing S. Rep. No. 00, 94th Cong., 1st Sess. 984 (1975)). And it is evident that Article IV(a) was intended not to displace the federal judiciary's authority to issue habeas writs, but merely to preserve a governor's ability to rebuff an extradition request from a sister state. See Pet. App. 9a-10a & n.2, 12a-13a.[4] None of this suggests that the IAD—which has the goal of "encourag[ing] the expeditious and orderly disposition" of outstanding charges against prisoners, 18 U.S.C. App. 2, Art. I—is best interpreted to permit a state governor to thwart a federal custody request on the basis of a policy disagreement with a congressionally authorized penalty.

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[4] By describing Article IV(a) as preserving gubernatorial power, the drafters of the IAD can be understood to have acknowledged this Court's holding in *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1861), that a federal court could not compel a state governor to comply with the Extradition Clause of the Constitution. See *id.* at 109-110; U.S. Const. Art. IV, § 2 (stating that "[a] Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime"). But that holding was later overruled in *Puerto Rico* v. *Branstad*, 483 U.S. 219 (1987), which described *Dennison*—decided less than a month before the Civil War began—as "the product of another time." *Id.* at 230; see Pet. App. 10a ("State interposition to defeat federal authority vanished with the Civil War."). Accordingly, it is not clear that Article IV(a) retains force even as to custody requests made by one state to another. See 12-223 Pet. 15; *Alabama* v. *Engler*, 85 F.3d 1205, 1206-1210 (6th Cir. 1996).

The *Mauro* Court's interpretation of the IAD has now stood for nearly the entire life of that statute. As petitioners point out (*e.g.*, 12-223 Pet. 27), Congress has amended the IAD in various ways since *Mauro* was decided, but has not chosen to displace *Mauro*'s holding with respect to Article IV(a). Under those circumstances, reading Article IV(a) to impliedly repeal the habeas statute would be particularly inappropriate. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) ("[*S*]*tare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what we have done." (citation and internal quotation marks omitted)); *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 804 n.4 (1998) (discussing the "the high value placed on *stare decisis* in statutory interpretation," particularly in light of "[t]he decision of Congress to leave" a prior Court decision "intact").

b. In light of this Court's interpretation of Article IV(a) in *Mauro*, the only remaining question is whether a state governor could dishonor a federal writ if the IAD had never existed. The First Circuit panel that originally ruled in petitioners' favor did not think so, explaining that giving "a state * * * a general right to disregard a properly granted *ad prosequendum* writ" would "conflict with the Supremacy Clause." Pet. App. 72a n.9; see *id.* at 63a.

On that point, the panel was correct. It is "patent" that "a state has never had authority to dishonor an *ad prosequendum* writ issued by a federal court." Pet. App. 10a; see *id.* at 7a. "Since the time of *Ex parte Bollman*, the statutory authority of federal courts to issue writs of habeas corpus *ad prosequendum* to secure the presence, for purposes of trial, of defendants in federal criminal cases, including defendants then in

state custody, has never been doubted." *Mauro*, 436 U.S. at 357-358. Once issued, such writs are "immediately executed," *id.* at 360, and compliance is mandatory, *Kenaan*, 557 F.2d at 916; see *Mauro*, 436 U.S. at 365-366, 369 (Rehnquist, J., dissenting) (stating that "writs of habeas corpus * * * cannot be refused"); see generally, *e.g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) ("State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution."); *Cooper* v. *Aaron*, 358 U.S. 1, 18-19 (1958); *In re Neagle*, 135 U.S. 1, 75 (1890); *Ex parte Royall*, 117 U.S. 241, 249 (1886) ("[t]hat the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court" to issue a writ of habeas corpus to vindicate his rights); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 406-409 (1872).

Petitioners do not unambiguously embrace the idea that in the absence of the IAD a state governor would have the power to refuse to honor a federal habeas writ. Compare, *e.g.*, 12-223 Pet. 13, 26 (attacking "conception of federal supremacy" that would use the habeas statute to "escape" the IAD), with *id.* at 30-32 (arguing that "basic principles of constitutional federalism" forbid use of the habeas writ to obtain custody of a state prisoner over state's objection). The implication of such a view—that federal habeas writs can be defied by state authorities as a matter of federalism—would be that portions of the federal habeas statute in place for more than a century are unconstitutional.[5] Similarly, the United States

[5] In 1867, Congress expanded the scope of federal habeas corpus to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United

would lack the power even to compel compliance with *ad testificandum* writs to bring state prisoners into federal court to testify in cases pending against others; state authorities could decline to furnish the witness if they disagreed with the federal prosecution. See generally *Demarest* v. *Manspeaker*, 498 U.S. 184, 185-186 (1991). Petitioners do not appear to press that argument here, and they did not advance it in the court below. See Pet. App. 63a (noting that Governor Chafee did not "assert[] a free-standing right to ignore federal *ad prosequendum* writs").

Nevertheless, petitioners do rely (*e.g.*, 12-230 Pet. 23-24) on long-ago court of appeals decisions that purport to say that a transfer of a state inmate to federal custody is a matter of comity alone. But as the en banc First Circuit explained, those cases do not establish that a state governor is free to disregard a federal court order despite the strictures of the Supremacy Clause. Pet. App. 10a-11a. Rather, "[t]o the extent not dicta or brief asides, such cases involved odd situations" and "misread * * * *Ponzi* v. *Fessenden*, 258 U.S. 254 (1922)," which involved the federal government's discretion to choose whether "to deliver a *federal* prisoner for trial on *state* charges"—not the other way around. Pet. App. 11a (emphasis added).

In sum, the issues raised by petitioners in this case were already resolved in *Mauro*, and correctly so.

States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. That enactment enabled a federal court to obtain a prisoner from state custody not only when the prisoner was "necessary to be brought into court to testify," Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82, but also when the prisoner's individual federal rights were violated. If Congress has the power to authorize a grant of habeas to vindicate a state prisoner's own federal rights, it also surely has the power to authorize the use of the writ to carry out important federal prerogatives.

Nothing "bizarre" (12-230 Pet. 11) or "odd" (12-223 Pet. 13) results from relying on basic Supremacy Clause doctrine to define the scope of a federal writ where the IAD has been interpreted to give state governors only as much power to disapprove that writ as they would otherwise have under the Constitution. And interpreting the IAD to avoid an implied repeal of the habeas statute averts an affront to federal power that Congress never contemplated or intended.

2. Contrary to petitioners' contention (12-223 Pet. 17-25; 12-230 Pet. 25-27), there is no conflict among the courts of appeals that have analyzed the key passage in *Mauro* and considered whether the IAD gives a state governor the right to dishonor a federal writ.

Several courts of appeals have reached the same conclusion as the First Circuit, holding that the IAD cannot be read to "confer on state governors the power to disobey writs issued by federal courts." *United States* v. *Graham*, 622 F.2d 57, 59 (3d Cir.), cert. denied, 449 U.S. 904 (1980); see *United States* v. *Bryant*, 612 F.2d 799, 802 (4th Cir. 1979) ("While an individual state has authority to disapprove another state's request for custody, it does not have authority and is not empowered by the [IAD] to reject a federal writ of habeas corpus ad prosequendum that serves as such a request, as the Supreme Court noted in *Mauro*."), cert. denied, 446 U.S. 919 (1980); *Trafny* v. *United States*, 311 Fed. Appx. 92, 95-96 (10th Cir. 2009) ("The passage of Article IV(a) of the IAD did not expand the authority of a sending state to dishonor an *ad prosequendum* writ issued by a federal court. * * * States have never had such authority."); see also *United States* v. *Blair*, No. 10-00093-01-CR-W-GAF, 2011 WL 6032853, at *3-*4 (W.D. Mo. Nov. 16, 2011). These courts have considered the statement in

Mauro resolving the issue to be "clear." *Graham*, 622 F.2d at 59.[6]

Petitioners' assertion of a circuit conflict is based entirely on the Second Circuit's decision in *United States* v. *Scheer*, 729 F.2d 164 (1984). But the relevant discussion in that decision is no more than dicta, as Judge Kearse correctly noted in her concurrence. See *id.* at 172 (Kearse, J., concurring); see also Pet. App. 12a. In *Scheer*, the court of appeals did not confront a situation in which a governor had actually refused to honor a federal writ; rather, it held that a transfer to federal custody before the expiration of the 30-day period in Article IV(a) did not deprive the prisoner of a full opportunity to challenge the transfer. See 729 F.2d at 170. The court first considered whether the 30-day period applied at all when the United States obtained custody by means of a habeas writ, and suggested that "the historic power of the writ *seems* unavailing once the government elects to file a detainer in the course of obtaining a state prisoner's presence." *Ibid.* (emphasis added). The court then held that the prisoner had waived the 30-day period in any event and could not rely on Article IV(a) as a basis for relief. See *id.* at 170-172 (deeming waiver a "more solid ground for rejecting defendant's challenge").

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[6] As petitioners note (*e.g.*, 12-223 Pet. 23), in *United States* v. *Hill*, 622 F.2d 900 (5th Cir. 1980)—which held that *Mauro* was not retroactive and therefore did not apply—the Fifth Circuit suggested that *Mauro*'s statement on this issue was "conditional." *Id.* at 907 n.18. The court also opined, however, that state governors do not have the power to dishonor the habeas writ: "The apposite [IAD] proviso mandates a thirty-day waiting period * * * . We would have thought that, under the Supremacy Clause, a state was not free to delay or disapprove compliance with the writ executed under federal statutory authority." *Id.* at 907.

Petitioners attempt (*e.g.*, 12-230 Pet. 26-27) to characterize the portion of *Scheer* discussing the applicability of Article IV(a) as an "alternate" holding rather than dicta. That characterization is wrong. While in some circumstances courts can announce holdings in favor of a defendant on one issue while ultimately ruling against the defendant on other grounds (see 12-230 Pet. 27), that is not the best interpretation of *Scheer*. It was the waiver holding that drove the outcome in that case, and the remainder of the Second Circuit's weakly stated observations about the "seem[ing]" state of the law, 729 F.2d at 170, were classic dicta. See, *e.g.*, *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996) (explaining that "those portions of the opinion necessary to [the] result" are binding).[7]

It does not appear that any court, let alone any governor of a state within the bounds of the Second Circuit, has understood *Scheer* to grant the power that Governor Chafee sought to exercise in this case.[8] There is there-

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[7] As noted above, petitioners claim (*e.g.*, 12-223 Pet. 27) that "*after* the Second Circuit's decision in *Scheer*" (emphasis in original) Congress amended the IAD to add certain provisions that apply only to the United States, but without adding a federal carve-out from Article IV(a). Because the courts of appeals have consistently held that Article IV(a) does not give a state governor the power to dishonor a habeas writ, Congress had no reason to create such a carve-out.

[8] Petitioners incorrectly assert (*e.g.*, 12-223 Pet. 24) that the United States has admitted the existence of a circuit conflict in an internal manual. The manual says that "[i]t has been held * * * that a State governor does not have 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," cites several cases for that proposition, and notes the existence of *Scheer* after the signal "[s]ee, however" (but does not quote from or describe the Second Circuit's decision). Department of Justice, *United States Attorneys' Manual, Title 9, Criminal Resource Manual*, 534(E)

fore no danger of regional differences in custody-transfer procedure and no conflict for this Court to address.

3. The agreement among the courts of appeals that have ruled on the interplay between the IAD and the habeas writ is sufficient reason to deny review in the case at hand. But a number of prudential reasons also counsel against reopening the issue that this Court resolved in *Mauro*.

First, the issue presented in this case arises very rarely. Only a handful of decisions address in any way the relationship between Article IV(a) of the IAD and the habeas statute. And no previous case of which the United States is aware involved the issuance of a federal *ad prosequendum* writ by the United States following a state governor's rejection of an informal request for temporary custody—because a governor has never previously "denied a federal request for custody under the IAD." Pet. App. 50a; see *id.* at 64a n.6 (deeming it "[s]ignificant" that in no prior case "did the governor * * * actually disapprove the federal government's IAD request or seek to block transfer under a subsequent *ad prosequendum* writ"); *United States* v. *Horn*, 29 F.3d 754, 769 (1st Cir. 1994) (explaining that a writ of mandamus is inappropriate unless issue is "likely to recur").

The rarity of the issue is not surprising given the radical nature of the rule that petitioners seek. As the en banc court explained, if state governors were able to dishonor federal writs once the IAD has been invoked, then state prisoners in IAD-governed cases could be

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(1997), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00534.htm. That bare notation does not indicate that the discussion in *Scheer* is anything more than dicta.

"permanently immune from federal prosecution," and "the state prison would become a refuge against federal charges." Pet. App. 13a-14a; see *id.* at 13a (stating that in that scenario "the use of the efficient detainer system" would be "badly compromised"). That would undermine our system of dual sovereignty, in which *each* sovereign is entitled to vindicate its laws. See *Heath* v. *Alabama*, 474 U.S. 82, 99 (1985) (discussing dual sovereignty in double jeopardy context and explaining that "were a prosecution by a State, however zealously pursued, allowed to preclude further prosecution by the Federal Government for the same crime, an entire range of national interests could be frustrated"). In addition, in a case in which the federal government lodged an IAD detainer, whether a state prisoner was subject to trial and sentence on federal charges would depend on which state had custody of him and what political views were held by the governor of that state at a particular moment in time. See *ibid.* ("One can hardly imagine Congress * * * empowering a state governor to veto a federal court habeas writ—designed to bring a federally indicted prisoner to federal court for trial on federal charges—because the governor opposed the federal penalty that might be imposed if a conviction followed."). State governors have not previously tried to undercut federal prosecutions in this way through use of Article IV(a)—and nothing suggests that they will begin to do so now.

Second, even were the issue likely to recur, this case would be a poor vehicle for resolving it, because this Court would have to address difficult procedural issues before reaching the merits of the parties' dispute. As petitioners explained in their unsuccessful attempts to obtain a stay of the mandate, a substantial mootness

question exists now that the habeas writ has been honored, the United States has secured custody of the prisoner, and the federal criminal proceedings are underway. See, *e.g.*, Stay Application No. 11A1113, at 19 (noting "substantial risk that the mandate's issuance will effectively extinguish Mr. Pleau's ability to obtain review"); C.A. Mot. to Stay Mandate 7-8 (discussing "risk that either movant might lose the right to have a meaningful review of the issues raised in this case" once mandate issues). The only relief considered by the First Circuit was a writ of prohibition. See, *e.g.*, Pet. App. 5a-6a (discussing difficulties inherent in assuming jurisdiction over Pleau's direct appeal). At this stage, however, nothing is left to prohibit, because no further action by any court is necessary for the United States to continue to retain custody of Pleau. Accordingly, whether relief can be granted in this case to "redress" the "asserted grievance" is a matter of serious doubt.[9] *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 70 (1983) (per curiam); see also, *e.g.*, *In re Davis*, 39 F.3d 1176 (4th

[9] It is also doubtful whether either petitioner is in a position to demand such relief. The First Circuit noted, but did not resolve, a dispute over whether Pleau had standing to challenge a transfer of custody to the federal government. See Pet. App. 6a (en banc decision); *id.* at 57a-58a (panel decision); *id.* at 76a, 78a (panel dissent); *id.* at 87a (district court ruling); *Derengowski* v. *United States Marshal*, 377 F.2d 223, 223 (8th Cir.) (stating that "[i]t is a well-established legal rule that a state prisoner is *without standing* to contest a federal court's issuance of a writ of habeas corpus ad prosequendum" and collecting cases), cert. denied, 389 U.S. 884 (1967); see also, *e.g.*, *United States* v. *Harden*, 45 Fed. Appx. 237, 239 (4th Cir. 2002) (per curiam). The Governor's status in this action is likewise open to question, given that he was permitted to participate as a party only through the highly unusual procedure of intervening in the appeal after briefing and oral argument had already been completed. See Pet. App. 5a (noting "belated intervention").

Cir. 1994) (Table) (deeming request for writ of prohibition moot where event petitioners sought to prohibit had already occurred); compare Pet. App. 99a (dissent from denial of motion to stay mandate) (stating that "[t]he transfer of Pleau to federal custody could moot this case entirely"), and *id.* at 62a (panel decision) (stating that "if Pleau were transferred" it is "unclear what remedy might be available to the Governor"), with *id.* at 95a (denial of motion to stay mandate) (suggesting that "objections based on the detainer statute would not be mooted" by issuance of mandate).

Finally, the new rule of law that petitioners espouse would not prevent the United States from obtaining custody of state prisoners who have been charged with federal crimes, because the United States need not invoke the IAD at all. This Court held in *Mauro* that the federal government "may obtain a state prisoner by means of an *ad prosequendum* writ without ever filing a detainer; in such a case, the Agreement is inapplicable." 436 U.S. at 364 n.30. In other words, if the United States simply obtains a habeas writ and never lodges an IAD detainer, a state governor cannot rely on the IAD as authority for refusing to turn the prisoner over to the federal government—and has no other possible basis for resisting the command of the writ. Pet. App. 63a (noting that "Governor Chafee has not asserted a free-standing right to ignore federal *ad prosequendum* writs"); *id.* at 72a n.9. The United States sometimes refrains from lodging an IAD detainer and obtains custody by use of a habeas writ alone, see, *e.g.*, *United States* v. *Beard*, 41 F.3d 1486, 1489 (11th Cir. 1995), and could, if necessary, use the habeas-only procedure in additional cases.[10]

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[10] To be sure, the IAD is a highly useful tool, and without it the government would face challenges in keeping track of prisoners in

That such a change in procedure could vitiate the right that petitioners claim suggests that the IAD should not be read in the way that they propose. In any event, however, it is clear that a ruling in petitioners' favor would not help state prisoners evade trial on federal charges or the penalties that flow from a federal conviction. In fact, forcing a change in procedure could leave such prisoners without the protections of various IAD provisions that unquestionably apply in a case like this one. See Pet. App. 89a & n.4; U.S. Reh'g Pet. 5.

Petitioners and their *amici* try to conjure practical consequences of their own, insisting that the First Circuit's decision weakens all of the federal government's contractual commitments, see 12-223 Pet. 12-13, 16, 28, 35, or destabilizes our system of federalism, see 12-230 Pet. 29-30. These arguments have no force. In keeping with *Mauro*, the First Circuit has sensibly interpreted one particular compact so as to avoid an implied repeal of a historic writ and a challenge to the supremacy of federal law. That decision is specific to the language and history of the IAD and the particular issues raised by competing claims to custody of a prisoner; it cannot be read to provide a generalized "escape hatch" (12-223 Pet. 29) that releases the United States from all of its promises or permits it to disregard states' sovereign powers. The decision is both careful and limited, and restores the status quo under *Mauro*. Nothing suggests that it will be any more disruptive than *Mauro* itself or the decisions of the other circuits that the First Circuit

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state custody who have been charged with federal crimes. See U.S. Reh'g Pet. 14 (explaining that without use of detainers prisoners can "slip through the cracks and vanish"), cited in 12-230 Pet. 28; *Mauro*, 436 U.S. at 364 n.29. Nevertheless, the United States does have an alternative to the IAD for securing custody of state prisoners.

has now joined—which is to say, not at all. This Court's review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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