Nos. 12-223 & 12-230

IN THE

Supreme Court of the United States

JASON W. PLEAU, *Petitioner,*
v.

UNITED STATES OF AMERICA, ET AL., *Respondents.*

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

UNITED STATES OF AMERICA, ET AL., *Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of *Amici Curiae* Rhode Island ACLU; National Association of Criminal Defense Lawyers; National Legal Aid & Defender Association; Office of the Federal Defender for the Districts of Rhode Island, Massachusetts and New Hampshire; Office of the Federal Defender for the District of Maine; Rhode Island Association of Criminal Defense Lawyers; and Colegio de Abogados de Puerto Rico Supporting Petitioners

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INTERESTS OF *AMICI CURIAE*

Amici curiae are organizations that represent and advocate for the rights of criminal defendants and prisoners.[1] Comprised of civil liberties groups, defenders' organizations, and professional bar associations, *amici* have an interest in the Court hearing this case, clarifying the United States' obligations under the Interstate Agreement on Detainers ("IAD"), and establishing a uniform rule to resolve a split of authority in the Circuit Courts of Appeals. Given their extensive experience working on behalf of prisoners, *amici*'s perspective may assist the Court in understanding the protections for defendants and prisoners built into the IAD, and the extent to which those benefits are lost when the United States is allowed to deviate at will from its commitments under the IAD. Prisoners and defendants are and will remain involved in litigation concerning the IAD, and thus, the Court's resolution of the issues raised by these petitions is particularly pertinent to *amici* and the individuals whom *amici* represent. Fundamentally, *amici* seek to safeguard the integrity of the IAD and the salutary processes it implements, and hope to inform the Court's consideration of those issues.

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[1] Counsel of record for all parties received timely notice of the intention of *amici curiae* to file this brief, per Supreme Court Rule 37.2(a). All parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

No counsel for a party authored this brief in whole or part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Interstate Agreement on Detainers ("IAD"), 18 U.S.C. app. 2, § 2, is an interstate compact that binds 52 parties, including the United States and the state of Rhode Island. Enacted by Congress in 1970, the IAD provides an efficient, uniform system for resolving outstanding detainers and, at the same time, protects the interests of prisoners in state and federal custody by granting specific rights to prisoners and generally encouraging cooperative federalism in connection with inter-jurisdictional transfers. The IAD empowers a prisoner in state custody, who is subject to a detainer, to ask his governor not to transfer him to federal custody to face charges in federal court. It also authorizes the governor to refuse to transfer the prisoner.

That is what occurred in this case. After lodging a detainer for Mr. Pleau, who was then in Rhode Island custody, the federal government requested his temporary custody to face federal charges. Mr. Pleau exercised his right under the IAD to petition Governor Chafee to refuse the request from the federal government. Based on public policy considerations, Governor Chafee exercised his authority under the IAD to decline to transfer Mr. Pleau to federal custody.

Displeased with this lawful outcome, the United States opted to circumvent the IAD by securing a writ of habeas corpus *ad prosequendum* for Mr. Pleau over the objections of Governor Chafee and Mr. Pleau. The en banc Court of Appeals for the First Circuit approved this procedural maneuver, which allowed the federal government to avoid its obligations under the IAD.

By allowing the United States to circumvent the IAD in this way, the First Circuit's decision violates Mr. Pleau's rights, threatens the IAD's prisoner-protective scheme, and undermines its framework of cooperative federalism. Here, by using a writ to obtain custody of Mr. Pleau, the federal government ignored Governor Chafee's right to refuse to transfer a prisoner from state custody and Mr. Pleau's right to seek this refusal. In so doing, the federal government received the benefits of lodging a detainer without fulfilling its obligations as a party to the IAD. This is precisely what this Court disallowed in *United States v. Mauro*, 436 U.S. 340 (1978).

By misinterpreting *Mauro*, the First Circuit returns detainer practice to the uncoordinated situation that existed before the IAD. Where the United States may selectively abide by the IAD, a core value of this predictable system is lost. Further, because Circuit Courts have decided this issue differently, uncertainty once again prevails. This Court should grant the petitions here to protect the rights that the IAD grants to prisoners, reinforce its interpretation of the IAD in *Mauro*, and restore order and predictability under the IAD among the Circuits.

ARGUMENT

I. THE DECISION BELOW SIGNIFICANTLY FRUSTRATES THE PRISONER PROTECTIONS OF THE IAD.

Detainers historically posed significant problems for prisoners, impacting both the conditions and duration of their confinement. Prior to the enactment of the IAD, there was no unified system governing the use and resolution of detainers. To address these problems, the IAD created uniform procedures and rights enjoyed by both prosecuting authorities and prisoners—including the prisoner's right to ask a governor to refuse transfer to face charges in another jurisdiction. By allowing the United States to use a writ of habeas corpus *ad prosequendum* to make an end-run around the gubernatorial refusal provision, the First Circuit's decision has threatened the prisoner-protective functioning of the IAD both in terms of the framework of procedures that form the core of the IAD, and the values of cooperative federalism that help to safeguard individual prisoners' rights.

A. Before the IAD, Prisoners Suffered Because of Detainers.

Beginning in at least the 1930s, law enforcement officers began to lodge detainers for wanted prisoners held in out-of-state custody. Detainers were informal documents, sometimes as simple as a letter requesting notification when the prisoner's release was imminent. *See* Janet R. Necessary, *The Interstate Agreement on Detainers: Defining the Federal Role*, 31 Vand. L. Rev. 1017, 1019 & n.2 (1978).

Detainers required no procedural prerequisites and could be based on "an arrest warrant, a complaint, or the mere desire . . . to interrogate the inmate . . . ." Larry W. Yackle, *Taking Stock of Detainer Statutes*, 8 Loy. L.A. L. Rev. 88, 90 (1975). As such, detainers could be lodged by anyone with authority to take a person into custody. *See*, *e.g.*, *United States v. Candelaria*, 131 F. Supp. 797, 798-799 (S.D. Cal. 1955) (prosecutor's office); *People v. Bryarly*, 23 Ill. 2d 313, 315, 178 N.E.2d 326, 329 (1961) (judge); *State ex rel. Faehr v. Scholer*, 106 Ohio App. 399, 399, 155 N.E.2d 230, 231 (10th App. Dist. 1958) (police chief).

Due to their ease of filing, detainers became widespread. *See* J.V. Bennett, "The Correctional Administrator Views Detainers," 9 Fed. Probation 3, 8 (Jun.-Sept. 1945) (article by Director of Federal Bureau of Prisons estimating that nearly 20 percent of federal prisoners were subject to lodged detainer); J.V. Bennett, "The Last Full Ounce," 23 Fed. Probation 20, 21 (Jun. 1959) (same author reporting "no evidence" that use of detainers had declined in intervening 14 years). But the ease of filing detainers also contributed to their indiscriminate use. *See* G. Heyns, "The Detainer in a State Correctional System," 9 Fed. Probation 13, 14 (Jun.-Sept. 1945) (noting that most states routinely file detainers whenever one of its parolees is incarcerated out-of-state). Many detainers were lodged but then forgotten. *See, e.g., United States v. Ford*, 550 F.2d 732, 738 (2d Cir. 1977) ("[I]t was estimated that as many as 50% of all detainers were allowed to lapse on the prisoner's release, without any attempts at prosecution by the jurisdiction that had filed the detainer."), *aff'd sub nom. United States v. Mauro*, 436 U.S. 340 (1978).

The pendency of a detainer had numerous deleterious effects on the prisoner whom it targeted. These effects included:

- Stricter conditions of confinement; *see* Bennett, "The Last Full Ounce," *supra*, at 21 ("[T]here remains a tendency to consider [prisoners subject to detainers] escape risks and to assign them accordingly."); Necessary, *supra*, at 1020 ("A prisoner known to be wanted by another jurisdiction is considered a greater escape risk and thus may be deprived of prison privileges or placed in maximum custody automatically without consideration of the seriousness of the charge, his attitude, or the likelihood that the detainer will be acted upon.");
- Ineligibility for parole; *see* Bennett, "The Correctional Administrator Views Detainers," *supra*, at 9 (noting that federal government and many states "refuse parole to those wanted elsewhere"); Yackle, *supra*, at 92 ("Detainers may . . . be taken into account by parole boards and . . . may directly affect the length of an inmate's present term of imprisonment."); *see, e.g.*, *In re Schechtel*, 103 Colo. 77, 79-80, 82 P.2d 762, 762-763 (1938) (federal prisoner seeking writ of habeas corpus ineligible for federal parole based on pending detainer);
- Ineligibility for beneficial work assignments; *see*, *e.g.*, *Candelaria*, 131 F. Supp. at 798-799 (federal prisoner subject to detainer ineligible for "trusty" status or work assignments outside prison walls); *United States v. Kenaan*,

> 557 F.2d 912, 916 (1st Cir. 1977) ("Outstanding detainers frequently provided grounds for denial of parole, participation in special work, athletic and release programs, visiting privileges, and minimum security status."), *cert. denied* 436 U.S. 943 (1978);

- Uncertainty regarding the future; *see* 18 U.S.C. app. 2, § 2, art. I (observing that detainers "produce uncertainties which obstruct programs of prisoner treatment and rehabilitation"); *United States v. Currier*, 836 F.2d 11, 15 (1st Cir. 1987) ("The main reason for the [IAD] . . . was to improve the rehabilitative environment for the prisoner by alleviating his uncertainty about future prosecutorial actions to be taken against him."); and
- Prejudice to the prisoner's defense, as "evidence [is] lost, witnesses disappear[], and memories fade[]." *Kenaan*, 557 F.2d at 916; *see, e.g., Smith v. Hooey*, 393 U.S. 374, 380 (1969) ("[A] man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.").

A detainer remained in effect "until the underlying charges [were] finally resolved"—there was no automatic term of expiration. *See Mauro*, 436 U.S. at 352. Prior to adoption of the IAD, however, "there was nothing a prisoner could do about [a lodged detainer]." *Ford*, 550 F.2d at 738-739.

> [A] prisoner's demand to be tried pursuant to a detainer on charges outstanding in a jurisdiction other than the one in which he was incarcerated was of

> no legal effect, because an inmate could not compel the state in which he was serving a sentence to transfer him to a state which had lodged a detainer. Likewise, it was practically impossible for the state which had lodged the detainer to obtain custody of the inmate prior to the completion of his sentence in the confining state.

B.J. Fried, *The Interstate Agreement on Detainers and the Federal Government*, 6 Hofstra L. Rev. 493, 497 (Spring 1978). Even if all involved parties were amenable to a temporary transfer of custody, the absence of a uniform process for the transfer sometimes prevented the transfer from occurring. *See Ford*, 550 F.2d at 740; *see also* Note, *Convicts-The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rutgers L. Rev. 828, 849 (1964) (noting that Ohio refused to transfer prisoners because of likelihood that they would not be returned). As Director Bennett lamented in 1945, "[i]t seems to be no one's job to . . . see that [lodged detainers] are speedily acted on." Bennett, "The Correctional Administrator Views Detainers," *supra*, at 9.

In sum, before the IAD, prisoners were subject to uncertain, idiosyncratic, and harmful detainer practices, in which they had no input (much less control) and no hope of anticipating the outcome.

B. The IAD Creates Essential Prisoner Protections by Establishing a Unitary System that Fosters the Orderly Resolution of Detainers.

Enacted by Congress in 1970 to ameliorate the detrimental effects of outstanding detainers, the IAD creates procedures by which prisoners and prosecutors may initiate the prompt disposition of untried charges and cooperative mechanisms to coordinate transfers among signatory jurisdictions. In establishing a process for the orderly resolution of detainers, the IAD creates several rights that directly benefit prisoners against whom detainers are lodged.

First, the prisoner has the right at any time after a detainer is lodged to request final disposition of any indictment, information, or complaint underlying the detainer. 18 U.S.C. app. 2, § 2, art. III(a); *see Carchman v. Nash*, 473 U.S. 716, 720-721, 730 (1985).

Second, the prisoner has the right to petition the governor of the custodial or "sending" state to disapprove a "receiving" state's request for temporary custody. 18 U.S.C. app. 2, § 2, art. IV(a) ("[T]here shall be a period of thirty days after receipt by the appropriate authorities [of the request for temporary custody] before the request be honored, within which period the governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or *upon motion of the prisoner*.") (emphasis added).

Third, the prisoner has the right to be brought to trial by the receiving State within a specified period—one hundred and eighty days when the prisoner initiates the request for final disposition, or one

hundred and twenty days when the receiving State files a request for temporary custody that is not disapproved. *Id*. arts. III(a), IV(c); *see also Fex v. Michigan*, 507 U.S. 43, 52 (1993). The receiving State's failure to bring the prisoner to trial within the allotted period results in dismissal of the untried indictment, information, or complaint.[2] 18 U.S.C. app. 2, § 2, art. V(c).

Fourth, the prisoner has the right to remain in the custody of the receiving State until he is brought to trial. 18 U.S.C. app. 2, § 2, arts. III(d), IV(e). Under these "anti-shuttling" provisions, the receiving State's failure to bring the prisoner to trial before returning him to his original place of imprisonment results in dismissal of the untried indictment, information, or complaint.[3] *Id*.

Fifth, the prisoner has the right to be transferred to the custody of the receiving State when that custody is offered (whether through the prisoner's request for final disposition or through the send-

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[2] The original IAD specified that, when an indictment, information, or complaint is to be dismissed, it is to be dismissed with prejudice. *See*, *e.g.*, 18 U.S.C. app. 2, § 2, arts. III(d), IV(e), V(c). In 1988, however—ten years after this Court's seminal decision in *Mauro*—Congress amended the federal enactment of the IAD to provide that, where the United States is the receiving State, the court has the option to dismiss with or without prejudice. *See id.* § 9(1). Significantly, the 1988 amendments did not provide for disparate treatment of the United States under the gubernatorial refusal provision of Article IV(a).

[3] The 1988 amendments also permitted an exception where the United States is the receiving State and the return to sending State custody is pursuant to court order. *See* 18 U.S.C. app. 2, § 9(2).

ing governor's failure to disapprove a request for temporary custody). *Id.* art. V(c). The receiving State's refusal or failure to accept custody of the prisoner when offered results in dismissal of the untried indictment, information, or complaint. *Id.*

C. The Use by the United States of a Writ of Habeas Corpus *Ad Prosequendum* to Avoid a Governor's Disapproval of Transfer Violates the Prisoner Protections of the IAD.

The decision below imperils the IAD's entire system of prisoner protections. By permitting the United States to obtain custody of a Rhode Island prisoner by use of a writ of habeas corpus *ad prosequendum* after first lodging a detainer and after Governor Chafee has disapproved the transfer, the First Circuit upends the plain meaning of Article IV(a) and threatens the integrity of the entire compact.

The prisoner-protective provisions of the IAD attach whether the receiving State is the United States or a state government. *See* 18 U.S.C. app. 2, § 2, art. II(a) (defining "state" to include United States of America); *see also Mauro*, 436 U.S. at 354 ("[T]he United States is a party to the [IAD] as both a sending and a receiving State."). Accordingly, the United States cannot "gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action." *Mauro*, 436 U.S. at 364; *cf. id.* at 361 ("[I]t is not necessary to construe 'detainer' as including these writs in order to keep the United

States from evading its duties under the Agreement.").

Courts have appropriately disapproved of attempts to avoid the prisoner protections of the IAD. In *Rashad v. Walsh*, the First Circuit held Massachusetts responsible for failing to lodge a detainer while Rashad was in custody in Texas, thereby delaying his prosecution and violating his right to a speedy trial. 300 F.3d 27 (1st Cir. 2002). "Holding otherwise would allow a state to circumvent the IAD with impunity." *Id.* at 37-38. In *Bloomgarden v. California Bureau of Prisons*, the United States failed to provide a federal prisoner the opportunity to contest his transfer to custody of the state of California by petitioning the United States Attorney General. 426 Fed. Appx. 487, 489 (9th Cir. 2011) (unpublished). Over California's objections that it was not bound by the IAD, the Ninth Circuit refused to allow California, once it had lodged a detainer, to "circumvent the requirements of the IAD by proceeding solely under an *ad prosequendum* writ" that it filed subsequently. *Id.* at 489; *see also Kenaan*, 557 F.2d at 916-917 (rejecting the United States' argument that it could avoid the IAD's provisions concerning a "written request for custody" by use of a writ of habeas corpus *ad prosequendum*).

Such a prisoner protection is implicated here. Under Article IV(a), a prisoner has the right to petition his governor to refuse to transfer him to the prosecuting authority that lodged the detainer. *See Cuyler v. Adams*, 449 U.S. 433, 444 (1981) (explaining that, after receiving State requests custody, "[f]or the next 30 days, the prisoner and prosecutor must wait while the Governor of the sending State, on his own motion or that of the prisoner, decides whether

to disapprove the request"). Here, Mr. Pleau made just such a request of the Rhode Island governor.

The drafters of the IAD intended that a gubernatorial refusal may be rooted in state public policy. Council of State Governments, Suggested State Legislation Program for 1957 at 79 (1956) (stating that Article IV(a) "accommodate[s] situations involving public policy"). The range of state public policies that may motivate a gubernatorial refusal is extensive and could include policies applicable to individualized circumstances such as endeavoring to keep a parent close to a minor child, more systemic interests such as maintaining the availability of a prisoner for on-going or contemplated state proceedings or allowing a prisoner to complete a substance abuse or other rehabilitation program in his or her current custodial setting, or much more generally applicable state public policy considerations. Here, Governor Chafee refused to transfer Mr. Pleau based on Rhode Island public policy that rejects capital punishment, and after Mr. Pleau's letter request.

If the First Circuit's ruling stands, Mr. Pleau's right under Article IV of the IAD to petition the governor to disapprove transfer would be effectively eviscerated. Such an abrogation of the IAD would upset the careful balance that Congress established between promoting the efficient resolution of outstanding charges and, at the same time, protecting the rights of prisoners. Although the detainer lodged against Mr. Pleau would remain unresolved (at least for a time), it would do so *with the prisoner's consent*. Should a prisoner in Mr. Pleau's position later decide to challenge the unresolved detainer, he could initiate his own transfer under Article III, which once invoked, mandates certain procedures and protec-

tions. *See* 18 U.S.C. app. 2, § 2, art. III(d) (warden "shall" notify prosecuting officials in receiving sState of prisoner's request for final disposition). The en banc First Circuit fails to appreciate this aspect of the IAD. Like the federal government, it misreads the IAD to focus on the efficient resolution of outstanding detainers without regard for—and even at the expense of—the rights of prisoners.

This Court's review is necessary because, by requiring the United States to respect Governor Chafee's lawful refusal, this Court will preserve the complete scheme that Congress created and protect individual liberties by restoring the balance that the IAD achieves.

D. The IAD Promotes Cooperative Federalism, Which Safeguards Individual Liberties.

The IAD by its very nature promotes cooperation among various sovereigns to resolve the problems associated with the untrammeled use of detainers. *See* 18 U.S.C. app. 2, § 2, art. I (purpose of IAD is to provide "cooperative procedures" for proper proceeding with respect to detainers). Indeed, Article IV(a) of the IAD encourages negotiation between sovereigns by providing each sovereign with the ability to withhold participation in a given case. In this respect, the IAD exemplifies the constitutional tradition of using federalism to safeguard individual civil liberties. *See*, *e.g.*, *New York v. United States*, 505 U.S. 144, 181-182 (1992) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. . . . '[A] healthy balance of power between the States and the Federal Government will

reduce the risk of tyranny and abuse from either front.'") (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)); *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism secures the freedom of the individual."); *see also* The Federalist No. 51, p. 320 (C. Rossiter ed. 2003) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

Accordingly, the United States' attempt to bypass the IAD is an affront not only to the several States as "separate and independent sovereigns," *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2603 (2012), but also to the rights of individual citizens, for whom "the individual liberty secured by federalism is not simply derivative of the rights of the States." *Bond*, 131 S. Ct. at 2364. In other words, a prisoner has an independent interest in the IAD's proper functioning and in restraining the United States from acting "in excess of the authority that federalism defines." *Id.* at 2363-2364.

Sensitive to these values, the IAD creates a well-functioning cooperative system. The fact that this case may present the unusual invocation of a governor's right of refusal vis-à-vis the federal government does not warrant sacrificing the important principles of federalism that will outlast this particular case. To the contrary, allowing the United States to circumvent the IAD will have far more serious negative consequences by unsettling the expecta-

tions of everyone who is subject to and relies upon the IAD. Any future negotiation between a sending State and the United States after the lodging of a detainer will be undermined, because the United States could simply opt-out of the IAD by securing a writ. Any future appeal by a prisoner to his or her governor would be superfluous, because the United States could simply override a governor's refusal prerogative.

This was not the agreement that Congress intended or enacted into law. To permit the United States to receive the benefits of the IAD, while evading its obligations, frustrates the objectives of Congress.

II. THE COURT SHOULD GRANT THE PETITIONS BECAUSE THE FIRST CIRCUIT'S OPINION MISINTERPRETS THIS COURT'S DECISION IN *MAURO*.

This Court recognized in *Mauro* that the IAD protects prisoners facing transfer to state or federal custody and applies equally to the United States. 436 U.S. at 356 ("There is no reason to assume that Congress was any less concerned about the effects of federal detainers filed against state prisoners than it was about state detainers filed against federal prisoners."). Moreover, "[o]nce the Federal Government lodges a detainer," the IAD "by its express terms becomes applicable and the United States must comply with its provisions." *Id.* at 362. The United States cannot "gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action." *Id.* at 364.

Article IV(a) plainly provides that, during the 30-day period after any receiving State requests temporary custody, the governor of the sending State may refuse to transfer the prisoner. *Cf. Carchman*, 473 U.S. at 726 (interpreting Article III based on "the plain language of the Agreement").

There is no support for the conclusion that, as the en banc First Circuit would have it, a writ is functionally a request for transfer under *Mauro* but, nonetheless, does not trigger the governor's right of refusal under Article IV(a). Moreover, there is no support for the conclusion that the first writ filed after lodging a detainer is required under *Mauro* to be treated as a request for transfer that may be refused, but that a *second* writ is not. As noted in the panel opinion, "any subsequent *ad prosequendum* writ is to be considered a written request for temporary custody under the IAD and, as such, subject to all of the strictures of the IAD, including the governor's right of refusal." *United States v. Pleau*, 662 F.3d 1 (1st Cir. 2011), *vacated* 680 F.3d 22 (1st Cir. 2012) (en banc).

The United States makes no effort to hide the fact that, after Governor Chafee refused to transfer Mr. Pleau, it sought a writ to make an end-run around Article IV(a). This provision must "not be made 'meaningless,' which could occur if federal authorities were to employ the writ as merely a means of circumventing the strictures of the Agreement." *Kenaan*, 557 F.2d at 916-917. That is precisely what the United States has sought to do in this case.

Allowing the United States to use a writ to opt-out of the IAD—and override a sending State's considered refusal to transfer a prisoner for public

policy reasons—undermines the IAD and frustrates its important goals. In contrast, requiring the United States to comply with its obligations, including the obligation to honor the discretionary decision of Governor Chafee to refuse to transfer Mr. Pleau, preserves the integrity of the IAD and advances its congressional objectives. *See Mauro*, 436 U.S. at 361-362 (refusing to adopt limited interpretation of written request for temporary custody where doing so would conflict with IAD's requirement that it "be liberally construed to effectuate its purposes"); *Cuyler*, 449 U.S. at 448-450 (effectuating IAD's purpose and its drafters' intentions in construing procedures of Articles III and IV differently).

III. THE COURT SHOULD GRANT THE PETITIONS BECAUSE CIRCUIT COURTS DISAGREE AS TO THE IMPACT OF A WRIT FILED AFTER A DETAINER.

The First Circuit is not the only Circuit to misapply *Mauro*. Circuits of the United States Courts of Appeals have rendered irreconcilable opinions regarding the scope of the federal government's obligation to comply with the IAD's gubernatorial refusal provision, Article IV(a). As a result of this disagreement, prisoners in different states fare differently under the IAD based simply on geography. In three Circuits, where Courts of Appeals have held that the United States is bound by the IAD, a prisoner retains its protections. In four Circuits, where Courts of Appeals have allowed the United States to circumvent the obligations of the IAD by using a writ, a prisoner loses its protections. Thus, for example, the prisoner in New York enjoys the full protections of the IAD, whereas the prisoner in New

Jersey may not. This arbitrariness is not contemplated by the IAD, a compact that sought to standardize procedures across diverse jurisdictions relating to detainers.

The Second Circuit has held that Article IV(a) binds not only "state" parties to the IAD, but also binds the federal government even when it seeks a writ after having first lodged a detainer. *United States v. Scheer*, 729 F.2d 164, 170 (2d Cir. 1984). In reaching this conclusion, the Second Circuit rejected the logic used by the First Circuit below, and held that to do otherwise "would be treating the federal government's participation in the IAD[] on a different footing than that of the States," in contravention of *Mauro*. *Id.* The Second Circuit instead concluded that, under *Mauro*, "the historic power of the writ seems unavailing once the [United States] government elects to file a detainer in the course of obtaining a state prisoner's presence for disposition of federal charges." *Id.*

Similarly, the Ninth Circuit has held that "[t]he IAD applies when the United States or a state '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*.'" *Bloomgarden*, 426 Fed. Appx. at 489 (quoting *Mauro*, 436 U.S. at 349). The Ninth Circuit concluded that California's attempt to proceed solely under its later-filed writ of habeas corpus *ad prosequendum* "was foreclosed by *Mauro*," and the state "could not 'remove [the] detainer' without complying with the IAD." *Id.* at 489, 490 (requiring that prisoner in federal custody be allotted statutorily mandated 30-day period to petition U.S. Attorney General to "exercise his discretion to disapprove [prisoner's] transfer").

Meanwhile, the Eighth Circuit has recognized the distinction between the federal government's use of a writ without having lodged a detainer (which does not implicate the IAD) and the federal government's use of a writ only after lodging a detainer (which does require compliance with the IAD), again relying on *Mauro*. *Baxter v. United States*, 966 F.2d 387, 389 (8th Cir. 1992).

The Third, Fourth, and Tenth Circuits, in contrast, have adopted a view of *Mauro* similar to that of the First Circuit below. In *United States v. Graham*, the Third Circuit held that a governor has no authority to decline to obey a writ, even if that writ is treated as a written request for custody pursuant to *Mauro*. 622 F.2d 57, 59 (3d Cir. 1980). In *United States v. Bryant*, the Fourth Circuit held that Article IV(a) "does not apply to a request in the form of a federal writ of habeas corpus *ad prosequendum* that follows a detainer . . . ." 612 F.2d 799, 802 (4th Cir. 1979). And in *Trafny v. United States*, the Tenth Circuit held that a prisoner in state custody does not have the right to petition the state's governor for relief under Article IV(a) where the federal government issues a writ after first having lodged a detainer. 311 Fed. Appx. 92, 95-96 (10th Cir. 2009) (unpublished).

The consequences of this split are dramatically heightened where a prisoner is held in custody of a non-death penalty state located in a Circuit that has misconstrued *Mauro*. In that situation, a governor may well wish to express state public policy by declining to transfer the prisoner to a capital punishment jurisdiction such as the United States. And the prisoner has the right under Article IV(a) to petition the governor to heed that public policy and de-

cline the transfer. But if that right is not preserved, the governor—by virtue of a compact that expressly allows for gubernatorial refusal based on state public policy—may find himself or herself compelled to facilitate the application of a penalty that the governor's constituents have disavowed. Such is the case here. Rhode Island has abolished the death penalty, yet Rhode Island is deprived of its right to prevent transfer of Mr. Pleau to federal custody because the United States has violated the IAD.

Under existing Circuit precedent, then, the same situation may occur in at least Massachusetts, Maine, Puerto Rico, Rhode Island, New Jersey, West Virginia, New Mexico, and the U.S. Virgin Islands. While the incidence of already-incarcerated state prisoners who are also eligible for the federal death penalty is presumably low, this case demonstrates that it is not purely theoretical. Given the states' decreasing use of the death penalty—both in terms of capital prosecutions, sentences, and executions[4]—the likelihood of such conflicts will only grow.

Moreover, the same federal-state policy conflict may arise in Circuits which have not yet opined on *Mauro*'s applicability. Thus, a prisoner in the custody of Michigan, Illinois or Wisconsin—all non-

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[4] See Death Penalty Information Center, *The Death Penalty in 2011: Year End Report* (Dec. 2011), *available at* http://www.deathpenaltyinfo.org/documents/ 2011__Year__End.pdf, reporting 78 new death sentences in 2011, down from 104 in 2010 and 224 in 2000, and representing the lowest number of death sentences in the "modern era of capital punishment." In addition, executions declined to 43 in 2011, down from 46 in 2010 and 85 in 2000. Other metrics evidencing states' declining use of the death penalty included Illinois' abolition of its death penalty and Oregon's moratorium.

death penalty states—will not know if a gubernatorial refusal to a transfer sought by the United States would be effective until the issue is addressed by the Sixth or Seventh Circuits, respectively.

The IAD was intended to alleviate such uncertainty and to regularize what had become a chaotic, ad hoc system. This Court's review of the decision below is necessary not only to resolve the Circuit conflict regarding the proper interpretation of *Mauro* and the United States' obligation to comply with the IAD, but also to restore order to what threatens to become, again, an arbitrary and unpredictable system.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant the Petitions for Writs of Certiorari and address these threats to the integrity and continuing vitality of the IAD.

Respectfully submitted,

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