Nos. 11-1775 & 11-1782

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 11-1775

UNITED STATES,
Appellee,

v.

JASON WAYNE PLEAU,
Defendant-Appellant

LINCOLN D. CHAFEE, in his capacity as
Governor of the State of Rhode Island,
Intervenor

_____

No. 11-1782

In re: JASON WAYNE PLEAU,
Petitioner

LINCOLN D. CHAFEE,
Governor of Rhode Island,
Intervenor

_____

On Appeal from a Decision and Order of the
United States District Court for the District of Rhode Island
and on Petition for a Writ of Prohibition

_____

BRIEF OF *AMICI CURIAE* RHODE ISLAND ACLU; ACLU OF PUERTO RICO; ACLU OF MAINE; ACLU OF MASSACHUSETTS; NEW HAMPSHIRE CIVIL LIBERTIES UNION; OFFICE OF THE FEDERAL DEFENDER FOR THE DISTRICTS OF RHODE ISLAND, MASSACHUSETTS AND NEW HAMPSHIRE; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; RHODE ISLAND ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AND COLEGIO DE ABOGADOS DE PUERTO RICO IN SUPPORT OF DEFENDANT-APPELLANT / PETITIONER AND REVERSAL OF THE DECISION AND ORDER BELOW

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Statement Pursuant to Federal Rule of Appellate Procedure 26.1

Amici curiae the Rhode Island ACLU, the ACLU of Puerto Rico, the ACLU of Maine, the ACLU of Massachusetts and the New Hampshire Civil Liberties Union, the National Association of Criminal Defense Lawyers, the Rhode Island Association of Criminal Defense Lawyers and Colegio de Abogados de Puerto Rico are non-profit organizations with no parent corporations, and no publicly held corporation owns 10% or more of *amici*'s stock.

Amicus curiae the Office of the Federal Defender for the Districts of Rhode Island, Massachusetts and New Hampshire is not a non-governmental corporate party.

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Identity, Interest and Authority of the Amici Curiae

The Rhode Island ACLU, the ACLU of Puerto Rico, the ACLU of Maine, the ACLU of Massachusetts and the New Hampshire Civil Liberties Union are affiliates (collectively, "ACLU Affiliates") of the American Civil Liberties Union, a nationwide, non-profit, non-partisan organization with over 500,000 members. Like the national organization, the ACLU Affiliates located within the First Circuit are dedicated to vindicating the principles of liberty and due process embodied in the Bill of Rights to the U.S. Constitution and federal law. In support of those principles, the ACLU Affiliates have appeared in numerous cases in this Court and the various district courts within the First Circuit as parties, counsel for parties and, as here, *amici curiae* regarding issues involving the rights of prisoners and criminal defendants.

The Office of the Federal Defender for the Districts of Rhode Island, Massachusetts and New Hampshire, by court appointment, represents indigent criminal defendants charged with federal offenses in the Districts of Rhode Island, Massachusetts and New Hampshire. The Office has litigated the interpretation and application of the Interstate Agreement on Detainers ("IAD" or "Agreement"), 18 U.S.C. App. 2, §§ 1-9, as well as its implications for State and Federal prisoners, and the Office anticipates that it will continue to address such issues on behalf of its clients.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with a direct national membership of more than 11,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. The Rhode Island Association of Criminal Defense Lawyers ("RIACDL"), founded in 1988, is an affiliate of NACDL. NACDL's and RIACDL's mission is to ensure justice and due process for the accused, to foster the integrity, independence, and expertise of the criminal defense profession, and to promote the proper and fair administration of criminal justice.

Colegio de Abogados de Puerto Rico (also known as the Puerto Rico Bar Association), founded in 1840, is a voluntary organization of attorneys in Puerto Rico. Capital punishment has long been one of the main areas of interest of the Colegio de Abogados, and in part through the organization's efforts, Puerto Rico has not had a capital statute since 1929, and capital punishment was explicitly prohibited by its Constitution in 1952. Due to Puerto Rico's relationship with the United States, however, it is subject to federal law, and Puerto Rico is a party to the IAD. As a result, although it has abolished capital punishment, Puerto Rico remains subject to requests to transfer prisoners to other jurisdictions to face

charges that may result in death sentences. The Colegio de Abogados has continually challenged such transfers. For example, the Colegio de Abogados filed an *amicus* brief with this Court (and the Supreme Court) opposing the transfer of Juan Martinez-Cruz, who was sought by the Commonwealth of Pennsylvania on capital murder charges. The Colegio de Abogados also filed an *amicus* appearance in the case of John Lee Morales-Gonzalez, who was sought by the State of Florida on capital kidnapping charges.

This case presents an important question concerning the interpretation and application of the IAD, which Congress enacted to ameliorate the detrimental effects that outstanding detainers have on State and Federal prisoners. Both Rhode Island and the United States are parties to the IAD and, thus, are bound by its provisions. A Panel of this Court has held that, having invoked the IAD by lodging a detainer and requesting the custody of a Rhode Island prisoner, the United States cannot, after the Rhode Island Governor exercised his discretionary authority under the IAD to refuse to transfer the prisoner to Federal custody, circumvent the provisions of the IAD by obtaining a writ of habeas corpus ad prosequendum to bring the Rhode Island prisoner into Federal court. This Court has granted rehearing en banc. The outcome of this case will have significant consequences for the integrity of the entire IAD process, because it will determine whether the United States can use a writ to evade its obligations under the Agreement and demand the transfer of

States prisoners to Federal custody, notwithstanding a Governor's considered objection on public policy grounds.

The *Amici Curiae* have sought leave of the Court to file this brief pursuant to Federal Rule of Appellate Procedure 29(a) and this Court's December 21, 2011 Order granting rehearing en banc and inviting the filing of *amicus* briefs with leave of the Court. Further, no party objects to the filing of the brief.

Statement Pursuant to Federal Rule of Appellate Procedure 29(c)(5)

No party or party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief. Moreover, no person other than the *amici curiae* (including their members and counsel) contributed money intended to fund preparing or submitting this brief.

Summary of Argument

The IAD is critically important to State and Federal prisoners subject to detainers based on untried charges. Enacted by Congress in 1970 to ameliorate the detrimental effects of outstanding detainers on prisoners, the IAD created cooperative procedures by which prisoners and prosecutors may initiate the prompt disposition of untried charges. The United States is a party to the IAD, and when it chooses to proceed under the IAD by lodging a detainer for a State prisoner, it must comply with the IAD's provisions, including the duty to respect a governor's discretionary decision to refuse to transfer the prisoner to Federal custody.

Here, the United States charged Jason Pleau, lodged a detainer against him and then requested his temporary custody under the IAD. When the Rhode Island Governor refused, as Article IV(a) of the IAD entitled him to do, the United States tried to circumvent the Agreement by using a writ of habeas corpus ad prosequendum. As the Panel ruled, however, *United States v. Mauro*, 436 U.S. 340 (1978), precludes the United States from using a writ to evade its obligations under the IAD. Further, permitting the United States to opt-out of the IAD, after lodging a detainer, would undermine the integrity of the entire IAD process, cause the very problems for prisoners that the IAD was intended to alleviate, and frustrate the cooperative procedures that lie at the heart of the scheme that Congress created.

Background on the Interstate Agreement on Detainers

The IAD was originally proposed to address the many harmful effects that an outstanding detainer imposes on a prisoner in State or Federal custody. *See United States v. Mauro*, 436 U.S. 340, 359-60 (1978) (*citing* Council of State Gov'ts, *Suggested State Legislation Program for 1957*, at 74 (1956)). In 1970, Congress enacted the IAD to ameliorate those consequences by establishing uniform procedures for the prompt disposition of any detainer that a requesting official (or "receiving State") lodged with a prisoner's custodian (or "sending State"). *See* 18 U.S.C. App. 2, § 2, art. I ("[I]t is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of [untried] charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints."); *United States v. Currier*, 836 F.2d 11, 15 (1st Cir. 1987) ("The congressional committee recommending passage of the Agreement noted that a detainer seriously disadvantages the prisoner against whom it is lodged."). *See generally* Larry W. Yackle, "Taking Stock of Detainer Statutes," 8 Loy. L.A. L. Rev. 88, 97 (1975) ("Rather than deal with particular cases on an *ad hoc* basis with special contracts," the IAD "purports to establish a general scheme for handling most cases swiftly and efficiently.").

Article III of the IAD empowers a prisoner to demand prompt trial of the charges underlying a detainer lodged against him. *See Carchman v. Nash*, 473 U.S. 716, 720-21, 730 (1985). After a prisoner notifies the receiving State that he

requests "final disposition to be made" of the charges, he must be brought to trial within 180 days. 18 U.S.C. App. 2, § 2, art. III(a); *see Fex v. Michigan*, 507 U.S. 43, 52 (1993). To facilitate this process, a prisoner must be given notice of a detainer. *See* 18 U.S.C. App. 2, § 2, art. III(b). The prisoner may then make a written request for final disposition to the "official having custody of him" who will "forward it . . . to the appropriate prosecuting official and court." *Id.* These provisions give prisoners the power they once lacked to clear detainers on their own initiative. *See Currier*, 836 F.2d at 14.

Article IV authorizes a receiving State to request temporary custody of a prisoner from a sending State so that it may initiate trial on the charges underlying a detainer. *See Mauro*, 439 U.S. at 351-52. After lodging a detainer, the receiving State may make a "written request for temporary custody." 18 U.S.C. App. 2, § 2, art. IV(a). This request shall be honored, except – as in this case – when the governor of a sending State exercises the discretionary authority to refuse to transfer the prisoner. *See id.* ("[T]here shall be a period thirty days after receipt" of the written request for temporary custody "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."). Once the prisoner has been transferred upon a request by the receiving State, he must be tried within 120 days. *See id.* art. IV(c). These provisions establish cooperative procedures for the efficient transfer of prisoners between party States to the IAD.

If a prisoner is returned to the sending State without trial, the charges in the receiving State must be dismissed. *See id.* arts. III(d), IV(e); *Alabama v. Bozeman*, 533 U.S. 146, 149 (2001) (affirming dismissal of charges in the receiving State because prisoner was returned to the sending State after arraignment but before trial); *Currier*, 836 F.2d at 14 (discussing dismissal remedy). In this way, the IAD promotes the prompt resolution of untried charges underlying outstanding detainers.

In the IAD, Congress defined the "State" to include the "United States of America" along with all other States. *See* 18 U.S.C. App. 2, § 2, art. II(a). Congress went on to define "receiving State" and "sending State" to include all "States," with no exception for the United States. *Id.* art. II(b)-(c); *see Mauro*, 436 U.S. at 362 ("[T]he United States is a party to the Agreement as both a sending and a receiving State."); *United States v. Kenaan*, 557 F.2d 912, 915 n.6 (1st Cir. 1977), *cert. denied* 436 U.S. 943 (1978) ("[T]he United States participates as both a sending and a receiving State and . . . when it lodges a detainer . . . the United States must comply with the Agreement.").

The IAD is not the exclusive means by which the United States may obtain custody of a State prisoner. *See Mauro*, 436 U.S. at 349. Rather than lodge a detainer and proceed under the IAD, the United States may petition a Federal court for a writ of habeas corpus ad prosequendum. *See* 28 U.S.C. § 2241(c)(5); *see also Kenaan*, 557 F.2d at 915 ("The differences between a detainer and a writ of habeas corpus ad prosequendum, in purpose, legal basis, and historical context, are so

fundamental as to constitute each a separate, distinct avenue for obtaining custody of prisoners for federal prosecution.").

On the other hand, the United States may proceed as a receiving State under the IAD by lodging a detainer against a State prisoner. In that case, if the United States later secures a writ to bring the prisoner into Federal court, that writ is deemed to constitute a "written request for temporary custody" under the IAD.

> [O]nce a detainer has been lodged, the United States has precipitated the very problems with which the Agreement is concerned. . . . It matters not whether the Government presents the prison authorities in the sending State with a piece of paper labeled "request for temporary custody" or with a writ of habeas corpus *ad prosequendum*. . . . The fact that the prisoner is brought before the district court by means of a writ of habeas corpus *ad prosequendum* in no way reduces the need for this prompt disposition of the charges underlying the detainer.

Mauro, 439 U.S. at 361-62; *see Currier*, 836 F.2d at 14 ("[O]nce a detainer is lodged against a prisoner, any subsequent writ issued against that same prisoner is a 'written request for temporary custody' under the Agreement."); *United States v. Schrum*, 504 F. Supp. 23, 25 (D. Kan. 1980), *aff'd* 638 F.2d 214 (10th Cir. 1981).

Argument

The fundamental principle at stake in this case is both straightforward and well-settled: "Once the Federal Government lodges a detainer," the IAD "by its express terms becomes applicable, and the United States must comply with its provisions." *Mauro*, 436 U.S. 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.

Yet, the United States would uproot this principle and undermine the integrity of the entire IAD process solely to reach its preferred case-specific result: to preserve its ability to prosecute Pleau in Federal court and possibly to sentence him to death. In doing so, the United States ignores Justice Holmes's admonition:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting). This appeal is admittedly unusual, but its dramatic facts should not distort the judgment that the IAD is – and must continue to be – an invaluable means to resolve outstanding detainers for State and Federal prisoners.

I. Once It Lodges A Detainer, The United States Must Not Be Allowed To Use A Writ To Evade Its Obligations Under The IAD.

A. The United States is a "receiving State" for the purposes of Article IV(a) of the IAD.

The Supreme Court ruled, in *Mauro*, that by lodging a detainer, the United States fully implicates the IAD, and like any other "receiving State," it must comply with all of the Agreement's provisions. *See Mauro*, 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."). Nevertheless, the United States asks the Court to dis-

regard the teaching of *Mauro* and reach the opposite conclusion: to allow the United States, after lodging a detainer, to use a writ to opt-out of the IAD and circumvent Article IV(a), which expressly permits the governor of a sending State to refuse to transfer a prisoner. *See Cuyler v. Adams*, 449 U.S. 433, 444 (1981) (explaining that, after a 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").

Critically, the United States concedes that "the IAD's speedy-trial and anti-shuttling provisions [have been] triggered," because it filed a detainer, and that "Pleau will receive the full benefit of ***those*** IAD protections." U.S. Br. at 5 (emphasis added). By that same act – lodging a detainer against Pleau – the refusal provision has also been implicated. The United States cannot ignore that aspect of the IAD. *See Mauro*, 436 U.S. at 355 (noting that Congress did not "dr[a]w a distinction between the extent of the United States' participation in the Agreement and that of the other member States"). Put simply, the United States cannot be permitted to pick-and-choose as between the provisions of the IAD, complying with some but evading others.

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 of the IAD based on "the plain language of the Agreement"). The United States

concedes that "a principal holding of *Mauro*" is that it is "both a sending and receiving State under the IAD." U.S. Br. at 7-8. Nevertheless, the United States asks to be treated ***as if*** it is only a sending State, not a receiving State, with regard to the refusal provision. In other words, the United States contends it may refuse to transfer a prisoner to State custody but a State may not refuse to transfer a prisoner to Federal custody. But the IAD does not privilege the United States in that way, and in *Mauro*, the Supreme Court rejected this same argument.

In *Mauro*, the United States "vigorously argue[d] that when Congress enacted the Agreement into law, the United States became a party to the Agreement only in its capacity as a 'sending State,'" but not a receiving State. 436 U.S. at 353-54. It further argued the IAD had "no relevance" to Mauro and Ford, who were transferred from New York custody to Federal custody, because the United States was "the recipient of state prisoners." *Id.* The Supreme Court was not persuaded:

> Nor are we persuaded by the Government's argument that, because the United States already had an efficient means of obtaining prisoners – the writ of habeas corpus *ad prosequendum* – Congress could not have intended to join the United States as a receiving State. Although the United States perhaps did not gain as much from its entry into the Agreement as did some of the other member States, ***the fact remains that Congress did enact the Agreement into law in its entirety, and it placed no qualification upon the membership of the United States***.

Id. at 355-56 (emphasis added). Reading the plain text of the IAD, the Supreme Court concluded "the statute itself gives no indication that the United States is to be exempted from the category of receiving States," and reviewing "[t]he brief leg-

islative history," it also found "no indication whatsoever that the United States' participation in the Agreement was to be a limited one." Moreover, the Supreme Court cited a then-pending bill, which was not passed, to "limit the United States' participation as a receiving State," and noted the proposed legislation "confirm[ed] the conclusion that the United States is currently a receiving State ***for all purposes***." *Id.* at 356-57 n.24 (emphasis added). Since *Mauro*, that has not changed.

Because the United States is a "receiving State," it stands on equal footing with all other party States with regard to the IAD's refusal provision. Prior to the enactment of the IAD, "the sending state was under no obligation to detain or deliver the prisoner except as it might choose to do so," and this "privilege" to refuse to transfer a prisoner was "maintained in modified form by Article IV(a) of the Agreement, which provides that the Governor of the requested state may refuse the request within 30 days after its receipt." *Kenaan*, 557 F.2d at 915-16; *Mauro*, 340 U.S. at 363 (concluding, based on the legislative history, that Article IV(a) was "meant to . . . preserve previously existing rights of the sending States").[1]

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[1] The IAD's refusal provision was not "nullified" by *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), as the United States mistakenly contends. U.S. Br. 7 ("Now . . . the clause looks like an empty shell."). In *Branstad*, the Supreme Court interpreted the mandatory language of the Extradition Clause, *see* U.S. Const., art. IV, § 2, cl. 2 ("A Person . . . *shall* on Demand . . . be delivered up.") (emphasis added), which contrasts sharply with the discretionary language of the IAD, *see* 18 U.S.C. App. 2, § 2, art. IV(a) ("the Governor of the sending State *may* disapprove") (emphasis added); *cf. Cuyler*, 449 U.S. at 435-36 & n.1, 443 (contrasting the IAD and Extradition Act); *Wallace v. Hewitt*, 428 F. Supp. 39, 42 (M.D. Pa. 1976) (same). Further, the Supreme Court held only that a State must comply with a proper extradi-

Congress defined the United States as a "State" under the IAD for all purposes, including the refusal provision. That legislative decision did not repeal the habeas statute, or create a State "veto" over a writ, as the United States argues. U.S. Br. at 4, 6, 11-12. When the United States proceeds solely under the habeas statute, which it may elect to do, a State presumably must comply with the writ and turn over the prisoner (although the Supreme Court has never needed to rule on that issue, *see Carbo v. United States*, 364 U.S. 611, 621 n.20 (1961)). But when the United States opts for the IAD, a State may refuse to transfer the prisoner, regardless of whether the United States uses a writ or a simple letter as its written request for temporary custody. That is the holding of *Mauro*, as recognized by *Currier*. The United States confuses mandatory compliance with a writ (when the United States does ***not*** proceed under the IAD) with discretionary refusal to transfer a prisoner pursuant to Article IV(a) (when it chooses to act under the IAD).

Of course, if the United States is displeased with how the IAD distributes power as between the party States, including the United States, then it should seek to amend the IAD through Congress. It is not for a federal prosecutor to unilaterally decide which provisions of the statutory scheme to accept, nor for the courts to

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tion request, pursuant to the Extradition Act, 18 U.S.C. § 3182, and that a Federal court may issue a writ of mandamus to compel that "ministerial act." It did not even mention the IAD, much less hold that its decision vitiated the statutory power of a sending State under Article IV(a) to refuse to transfer a prisoner. Thus, neither *Branstad* nor other extradition cases resolve the issue before the Court.

re-write the Agreement to alter the careful balance struck by Congress. *See Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010) (stating that, if "[an] effect" of a statutory scheme was "unintended," "it is a problem for Congress, not one that federal courts can fix"); *Lawson v. FMR LLC*, __ F.3d __, 2012 WL 335647, at *18 (1st Cir. Feb. 3, 2012) (noting that only Congress "can amend [a] statute" and the Court is "bound by what Congress has written"). Notably, ten years after the Supreme Court decided *Mauro*, Congress amended the IAD to add "[s]pecial provisions when the United States is a receiving State." 18 U.S.C. App. 2, § 9. At that time, Congress could have also altered the scheme to relieve the United States of its obligation to respect the refusal provision, but Congress chose not to do so. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

B. The United States must not be permitted to use a writ to evade its obligations under the IAD.

The United States makes no effort to hide the fact that, after the Governor refused to transfer Pleau, it sought a writ to make an end-run around Article IV(a). Yet the courts, including the Supreme Court and this Court, have consistently interpreted the IAD to prevent all parties, even the United States, from using a writ to circumvent its provisions. Permitting the United States to use a writ for that purpose would present a significant and misguided departure from prior precedent.

In *Mauro*, the Supreme Court rejected a narrow reading of "written request for temporary custody" in Article IV(a) because that interpretation would "allow the Government to gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action." 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."). In *Rashad v. Walsh*, 300 F.3d 27 (1st Cir. 2002), this Court held Massachusetts responsible for failing to lodge a detainer while a prisoner was in custody in Texas, thereby delaying his prosecution, because "[h]olding otherwise would allow a state to circumvent the IAD with impunity." *Id.* at 37-38; *see also Bloomgarden v. Cal. Bur. of Prisons*, No. 09-56670, 2011 WL 1301541 (9th Cir. Apr. 6, 2011) (unpublished) (ruling Bloomgarden's transfer was improper because "California's attempt to circumvent the requirements of the IAD by proceeding solely under an *ad prosequendum* writ, after a detainer had already been filed, was foreclosed by *Mauro*" and because "California could not 'remove [the] detainer' without complying with the IAD").

As this Court has cautioned, the IAD's provisions 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 916-17. 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 send-

ing State's considered refusal to transfer a prisoner for public policy reasons – would undermine the Agreement and frustrate its important goals. In contrast, requiring the United States to comply with its obligations, including to honor the discretionary decision of the Governor to refuse to transfer Pleau, would best protect the integrity of the IAD and advance its congressional objectives. *Cf. Fex*, 507 U.S. at 55 (Blackmun, J., dissenting) ("In each of this Court's decisions construing the IAD, it properly has relied upon and emphasized the purpose of the IAD.").

Because the United States will continue to use detainers in future cases, its compliance with the IAD is critical. *See Mauro*, 436 U.S. at 364 n.29 (noting that, despite the availability of the writ, the United States "makes great use of detainers and considers them to play an important function"); U.S. Br. at 2 ("The filing of detainers has been a routine practice for decades in both the federal and state systems."); *see also Rashad*, 300 F.3d at 37 (criticizing the failure to lodge a detainer as "a significant misstep" and "plainly negligent"); *Kenaan*, 557 F.2d at 915 (explaining that detainers serve a critical notice function).[2] The Panel did not propose, as a "solution," that the United States "just refrain from using detainers." U.S. Br. at 14. That argument takes on a strawman. Rather, the Panel left open two options

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[2] Historically, the United States has typically lodged detainers and proceeded under the IAD. *See Mauro*, 436 U.S. at 364 n.29 ("[D]uring a typical year federal courts issue approximately 5,000 *ad prosequendum* writs and . . . about 3,000 of those are in cases in which a detainer has previously been lodged against a prisoner."). More recent data are not available, but anecdotal evidence indicates that the United States continues to proceed via detainer frequently, as it has against Pleau.

for the United States: it may comply with the IAD as enacted by Congress, or convince Congress to amend the statutory scheme.

II. The IAD Serves The Interests Of Prisoners And Encourages Federal-State Cooperation.

A. The *ad hoc* use of detainers, as occurred before the IAD, has significant adverse effects on prisoners.

A detainer can be lodged by "virtually any law enforcement officer." *United States v. Ford*, 550 F.2d 732, 738 (2d Cir. 1977), *aff'd sub nom. United States v. Mauro*, 436 U.S. 340 (1978); *see, e.g., State ex rel. Faehr v. Scholer*, 106 Ohio App. 399, 155 N.E.2d 230 (10th App. Dist. 1958) (police chief); *United States v. Candelaria*, 131 F. Supp. 797, 798-99 (S.D. Cal. 1955) (prosecutor). A detainer is also informal and can be as simple as a letter requesting the writer be advised when the prisoner's release is imminent. *See* Janet R. Necessary, "The Interstate Agreement on Detainers: Defining the Federal Role," 31 Vand. L. Rev. 1017, 1019 & n.2 (1978). And a detainer requires no procedural prerequisites; it can be based on "an arrest warrant, a complaint, or the mere desire on the part of the filing authority to interrogate the inmate," and "little information about the underlying charge accompanies a detainer" to the facility holding the prisoner. Yackle, *supra*, at 90.

Unlike a writ, a detainer does not result in an immediate transfer of the prisoner. Rather it "merely puts the officials of the institution in which the prisoner is incarcerated on notice that the prisoner is wanted in another jurisdiction for trial upon his release from prison." *Mauro*, 436 U.S. at 358; *see Kenaan*, 557 F.2d at

915 (comparing a detainer to a request that "the prisoner be placed on the 'will call' shelf"). Thus, before the IAD, the requestor typically did not obtain custody until the prisoner completed his sentence. *See Ford*, 550 F.2d at 737.

Lodging a detainer, however, has numerous detrimental effects on prisoners. *See Kenaan*, 557 F.2d at 916 ("Outstanding detainers frequently provided grounds for denial of parole, participation in special work, athletic and release programs, visiting privileges, and minimum security status."). An outstanding detainer often results in stricter conditions of confinement. *See* 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."); J.V. Bennett, "The Last Full Ounce," 23 Fed. Probation 20, 21 (June 1959) [hereinafter "Ounce"]; *cf. United States ex rel. Giovengo v. Maroney*, 194 F. Supp. 154, 156 (W.D. Pa. 1961) (pendency of resolved, but unsentenced, intrastate indictment resulted in prisoner's confinement at medium-security prison rather than youthful offender camp). A detainer can also lengthen the prisoner's actual term of confinement. *See* 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."); J.V. Bennett, "The Correctional Administrator Views Detainers," 9 Fed. Probation 3, 9 (June-Sept. 1945) [hereinafter "Administrator"].

During a prisoner's incarceration, an outstanding detainer – and the resulting uncertainty regarding the prisoner's future – frustrates the ability of corrections officials to encourage effective rehabilitation. *See* 18 U.S.C. App. 2, § 2, art. I (finding that detainers "produce uncertainties which obstruct programs of prisoner treatment and rehabilitation"). "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." *Currier*, 836 F.2d at 15;. That uncertainty adversely affects the prisoner's ability and motivation to advance his own rehabilitation, *see* Bennett, "Ounce," at 21, and makes the prisoner ineligible for desirable work assignments and programs, *see Currier*, 836 F.2d at 15; *see, e.g.*, *Candelaria*, 131 F. Supp. at 798-99 (detainer rendered prisoner ineligible for parole, "trusty" status or beneficial work assignments outside of prison).

Perhaps most importantly, without the IAD, "there [is] nothing a prisoner could do" about a detainer once lodged. *Ford*, 550 F.2d at 738-39.

> When the [IAD] was initially proposed, 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.

Bernard J. Fried, "The Interstate Agreement on Detainers and the Federal Government," 6 Hofstra L. Rev. 493, 497 (Spring 1978); *see also* Bennett, "Administrator," at 9 (noting that prior to the IAD, "[i]t seem[ed] to be no one's job to . . . see

that [detainers were] speedily acted on"). Such delay seriously undermines a prisoner's right to defend against any untried charges, because "evidence [is] lost, witnesses disappear[], and memories fade[]," *Kenaan*, 557 F.2d at 916, and meanwhile, "a man isolated in prison is powerless to exert his own investigative efforts to mitigate those erosive effects of the passage of time," *Smith v. Hooey*, 393 U.S. 374, 380 (1969); *see, e.g.*, *Fouts v. United States*, 253 F.2d 215, 218 (6th Cir. 1958) (where prisoners served 10 years in state prison with federal indictment and detainer pending against them, finding no evidence they knew of federal charges).

B. The IAD alleviates the adverse effects of outstanding detainers.

The very ease of filing detainers contributed to their widespread and indiscriminate use: by the time the Supreme Court decided *Mauro*, "it 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." *Ford*, 550 F.2d at 738. Whether or not a detainer was ever acted upon, however, it adversely affected the prisoner. Congress enacted the IAD to alleviate these detrimental effects, and the IAD has been effective in that regard.

As noted *supra*, the IAD creates two separate but related processes for disposing of a detainer. Article III empowers the prisoner to demand prompt resolution of the charges underlying a lodged detainer. Article IV enables the authority who filed the detainer to request custody of the prisoner for the purpose of promptly trying the prisoner on the charges.

These procedures to dispose of a lodged detainer minimize the detrimental effects on the prisoner, including on the conditions of confinement, length of imprisonment, availability and efficacy of rehabilitation programs, and mental well-being, all of which stem not from the lodging of a detainer *per se* but rather from the pendency of an unresolved detainer. Resolution of the charges underlying a detainer also enables corrections officials to devise an appropriate rehabilitation plan for the prisoner, including special programs, work assignments and even parole. And the opportunity promptly to resolve the charges underlying the detainer minimizes the likelihood that delay will prejudice a prisoner's defense.

C. The IAD also promotes inter-state and state-federal comity.

In addition to encouraging the prompt resolution of outstanding detainers, Congress also enacted the IAD to promote negotiation among governmental authorities. In this regard, the IAD creates a well-functioning, protective system that balances the interests of the prisoner, the prosecutor in the receiving State, and the Governor of the sending State, giving each a voice in the process.

The IAD expressly encourages comity amongst party States. Article I emphasizes the need "cooperative procedures" to resolve outstanding detainers and states: "It is the further purpose of this agreement to provide such cooperative procedures." 18 U.S.C. App. 2, § 2, art. I. By requiring both the official in the receiving State and the governor of the sending State to consent before a prisoner is transferred, the IAD requires a negotiated compromise when one party raises con-

cerns or otherwise withholds consent. Put a different way, the IAD requires political buy-in from both the receiving State's prosecutor and the sending State's Governor. *See* Council of State Gov'ts, *Suggested State Legislation Program for 1957*, at 78-89 (noting that art. IV(a) empowers governor of sending State to withhold consent "to accommodate situations involving public policy").

This aspect of the IAD fits within the constitutional tradition of using cooperative federalism to safeguard individual liberties. The Supreme Court has observed, in another statutory context, that under the Constitution, "[s]tate 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.'" *New York v. United States*, 505 U.S. 144, 181-82 (1992) (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)); *see Printz v. United States*, 521 U.S. 898, 935 (1997) ("This separation of powers," between the State and Federal governments, "is one of the Constitution's structural protections of liberty."); *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.").

If the United States prevails, and is permitted to circumvent the IAD, any future negotiation between a sending State and the United States would be undermined, because the United States could simply opt-out of the IAD by securing a writ. In the meantime, the detainer would have served its purpose, preventing the prisoner's release without notification to the United States. Worse, it would remain outstanding, subjecting the prisoner to the detrimental effects that the IAD was meant to alleviate. Thus, the United States would receive the benefits of the IAD, while evading its obligations and frustrating the objectives of the congressional scheme. This is exactly what the Supreme Court sought to avoid in *Mauro*.

Conclusion

For the foregoing reasons, *Amici Curiae* Rhode Island ACLU, ACLU of Puerto Rico, ACLU of Maine, ACLU of Massachusetts, New Hampshire Civil Liberties Union, Office of the Federal Defender for the Districts of Rhode Island, Massachusetts and New Hampshire, National Association of Criminal Defense Lawyers, Rhode Island Association of Criminal Defense Lawyers, and Colegio de Abogados de Puerto Rico respectfully request that the Court protect the IAD's integrity by reversing the District Court's decision, vacating the writ ad prosequendum and issuing a writ of prohibition, as requested by Defendant-Appellate / Petitioner Pleau and Intervenor Governor Chafee.

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Certificate Of Service

I hereby certify that, on February 16, 2012, a true and accurate copy of the foregoing Brief of *Amici Curiae*

Rhode Island ACLU; ACLU of Puerto Rico; ACLU of Maine; ACLU of Massachusetts; New Hampshire Civil Liberties Union; Office of the Federal Defender for the Districts of Rhode Island, Massachusetts and New Hampshire; National Association of Criminal Defense Lawyers; Rhode Island Association of Criminal Defense Lawyers; and Colegio de Abogados de Puerto Rico in Support of Defendant-Appellant / Petitioner and Reversal of the Decision and Order Below was filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users, including:

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