Nos. 11-1775 & 11-1782

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

JASON WAYNE PLEAU,
Defendant-Appellant.

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

IN RE: JASON WAYNE PLEAU,
Petitioner.

UNITED STATES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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STATEMENT REQUIRED BY FED. R. APP. P. 35(b)(1)

The panel opinion conflicts with a Supreme Court decision: *United States v. Mauro*, 436 U.S. 340 (1978). It also conflicts with four circuit court decisions, including a decision of this Court: *United States v. Kenaan*, 557 F.2d 912 (1st Cir. 1977); *United States v. Bryant*, 612 F.2d 799 (4th Cir. 1979); *United States v. Graham*, 622 F.2d 57 (3d Cir. 1980); and *United States v. Trafny*, 311 Fed. Appx. 92, 2009 WL 289713 (10th Cir. 2009) (unpublished). In addition, the issue presented is of "exceptional importance" because the panel opinion (a) erodes the longstanding federal judicial power to obtain custody of state inmates charged with federal offenses, and (b) effectively terminates a federal prosecution involving serious charges.

STATEMENT OF THE ISSUE

Whether the federal judicial power to obtain the presence of an inmate by a writ of habeas corpus *ad prosequendum* is unimpaired by a state's refusal to transfer custody under the Interstate Agreement on Detainers Act (IAD).

STATEMENT OF THE CASE AND FACTS

On September 20, 2010, as David Main approached a federally-insured bank in Woonsocket to deposit cash from the gas station of which he was manager, Jason Pleau chased him to the doorstep of the bank while firing a handgun at him four to six times, ultimately shot him to death at the front door to the bank, and stole the money ($12,542). Others in the vicinity could have been killed by the stray bullets. Pleau has

a long and violent criminal record, including a conviction for beating a prison guard and trying to push him over a third-story railing.

A federal grand jury charged Pleau with (1) conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951(a), (2) a substantive Hobbs Act count, and (3) possessing, using, carrying, and discharging a gun in relation to a crime of violence with death resulting, in violation of 18 U.S.C. §§ 924(c)(1)(A) & (j)(1). (A:2.)[1] The indictment also named two others who helped Pleau plan and commit the crime.

Before the indictment, Pleau was arrested and confined in state prison for probation and parole violations. His release date is 2028. The U.S. Marshals Service lodged a detainer to insure against his accidental release. The filing of detainers has been a routine practice for decades in both the federal and state systems. (A:1-2.)

On May 25, 2011, the district court approved the government's IAD request seeking Pleau's transfer to federal custody, and transmitted it to the state. On June 23, the Governor of Rhode Island sent the government a letter in which he denied the request without explanation. In light of his press statements, however, it emerged that his refusal was based on objections to capital punishment. (A:2,16.)

Four days after the Governor's refusal, the government petitioned the district

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[1] The government will cite its addendum as "A:__". Pleau is eligible for the death penalty if convicted. The Attorney General has not decided whether the government will seek that penalty.

court for a writ of habeas corpus *ad prosequendum* to secure Pleau's presence for arraignment. On June 30, the district court granted the petition and issued the writ. (A:15-18.) Pleau then sought relief in this Court. (A:2.)

Pleau was due to be transferred from state custody and arraigned in the district court on July 8. On July 7, the panel stayed that action. Judge Boudin dissented, noting that the Supreme Court has "made it clear that the traditional habeas writ remains unencumbered in its authority and that the IAD provides no state veto over the writ," so that "there is no justification, even of an arguable character, for disturbing the district court's action – let alone 'clear entitlement' to relief on Pleau's part . . . temporarily or otherwise." (7/7/11 Order, Boudin, J., dissenting.)

Briefing was expedited. The Governor of Rhode Island filed an amicus brief supporting Pleau, and belatedly intervened after oral argument. (A:2-4.)

On October 13, the panel granted a writ of prohibition over a dissent by Judge Boudin. The panel held that: (1) jurisdiction was proper under an advisory writ of prohibition theory because (a) the issue raised is important, and (b) there is no need to show clear error; (2) the claim that Pleau lacked standing was mooted by the Governor's intervention; (3) a controlling Supreme Court case left open the door for a different result; (4) contrary decisions of three circuits were not persuasive; and (5) as a matter of statutory construction, once a governor refuses to transfer an inmate

under the IAD, a district court is powerless to obtain the inmate by a federal *ad prosequendum* writ. (A:4-11.) The decision effectively ends the prosecution.[2]

SUMMARY OF ARGUMENT

Judge Boudin states the crux of the issue: "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. Of course, Congress has not provided states with any such veto power, and the Supreme Court has already made this clear in *United States v. Mauro*, 436 U.S. 340 (1978)." (A:11.) *Mauro* is dispositive; it flatly contradicts the panel opinion. The opinion is also undercut by: (1) decisions of four circuits, including a decision of this circuit; (2) the absence of any meaningful case law to the contrary; (3) the historical and practical importance of the writ; and (4) the Supremacy Clause.

[2] Since it granted the writ of prohibition in No. 11-1782, the panel dismissed the interlocutory appeal in No. 11-1775 as moot.

ARGUMENT

I. The panel opinion is flatly contradicted by the Supreme Court's decision in *Mauro*

Contrary to the panel opinion, the IAD does not provide a basis for flouting the writ. It is true that the IAD's speedy-trial and anti-shuttling provisions are triggered where, as here, (1) a federal detainer is lodged against an inmate who is serving a state sentence, and (2) the district court issues a writ of habeas corpus *ad prosequendum* to obtain his presence to face federal charges. *See Mauro*, 436 U.S. at 361-65; *United States v. Currier*, 836 F.2d 11, 14-15 (1st Cir. 1987). Thus, Pleau will receive the full benefit of those IAD protections.

The Supreme Court has made equally clear, however, that nothing in the IAD impairs the long-established federal power to issue the writ. When the government argued in *Mauro* that if the writ constituted a "written request" under the IAD, states might use Article IV(a) (set forth at A:21) to dishonor the writ, the Court responded:

> We are unimpressed. The proviso of Art. IV(a) does not purport to augment the State's authority to dishonor such a writ. As the history of the provision makes clear, it was meant to do no more than 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."

Mauro, 436 U.S. at 363 (footnote omitted).

Thus, Judge Boudin correctly concluded: "the panel decision adopts a reading of the federal statutes that disregards an *explicit contrary determination* by the Supreme Court . . . on the relationship between the writ and the IAD." (A:13) (emphasis in original). As he says: "*Mauro* did not hold, as the panel majority supposes, that the filing of a detainer with state authorities disempowers the habeas writ or gives the governor a veto over its use; the Court, in the indented passage quoted above, said *exactly* the opposite." (A:14) (emphasis in original).

Instead, the quoted passage and footnote 28 of *Mauro* make clear that Article IV(a) had a very narrow purpose when it was drafted circa 1956: it "merely preserved for the holding state its traditional authority to refuse an extradition request from another state . . . ." (A:13) (citing *Mauro*, 436 U.S. at 363 & n.28). The drafters themselves noted the residual nature of the disapproval clause: "The possibility is left open *merely* to accommodate situations involving public policy which *occasionally* have been found in the history of extradition." *Council of State Governments, Suggested State Legislation Program for 1957* (1956), at 79 (emphasis added).

This seldom-invoked state prerogative, in turn, was nullified by the Supreme Court in 1987, when it overruled *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861).

See Puerto Rico v. Branstad, 483 U.S. 219, 226-29 (1987). *Branstad* held that (1) "the commands of the Extradition Clause are mandatory, and afford *no discretion* to executive officers or courts of the asylum state," and (2) federal courts are empowered to enforce this obligation as between the states. *Id.* (emphasis added).

After *Branstad*, it is doubtful a state has much leeway under Article IV(a) to refuse a transfer request by another state, let alone a transfer request by the United States. *Cf. Alabama v. Engler*, 85 F.3d 1205, 1206-10 (6th Cir. 1996) (Michigan could not refuse extradition based on disagreement with Alabama prosecution). Now that the "previously existing" rights between states that the disapproval clause was meant to "preserve" no longer exist, the clause looks like an empty shell. The key point, however, is that the clause is simply a vessel for whatever vestiges of state-to-state rights that may remain. It was never intended to modify or supplant the federal *ad prosequendum* writ, as the Supreme Court made clear in the quoted *Mauro* passage.

The panel opinion seeks to neutralize the quoted passage in three main ways. First, the panel posits that it cannot mean what it says because that would conflict with *Mauro's* holdings that (1) once a detainer is lodged, any subsequent writ qualifies as a "written request" that triggers the IAD, and (2) the United States is both a sending and receiving state under the IAD. (A:7-8.) But the *Mauro* Court clearly *did* mean what it said, it said it clearly, and there is nothing "mysterious" (A:7) about its

conclusion that the IAD does not diminish the power of the writ. Nor is this conclusion in any conflict with the two principal holdings of *Mauro*. The view that these aspects of *Mauro* are irreconcilable is not only wrong, but it amounts to a second-guessing of the Supreme Court.

Second, the panel offers its own interpretation of the passage: "Rather, it is at least equally plausible to understand the *Mauro* majority as reaffirming that although states did not historically have the power to ignore federal habeas writs at will and were not granted that power by the IAD, nevertheless, under certain circumstances, what is ostensibly a federal ad prosequendum writ is in effect a request for temporary custody under the IAD, and -- under those circumstances -- subject to the restrictions imposed on such requests." (A:7.) This sentence is hard to decipher.

Third, the panel stresses the conditional nature of the "If" in "If a State has never had authority to dishonor an *ad prosequendum* writ . . . ." (A:7-8.) But as Judge Boudin notes, citing Supreme Court precedent, it is "patent" that a state has never had such authority. (A:13-14.) This would explain why, as far as anyone can tell, "no state has ever refused to honor the writ." *United States v. Kenaan*, 557 F.2d 912, 916 n.8 (1st Cir. 1977). The conditional phrasing of the sentence was merely restrained rhetoric rather than an expression of doubt.

II. The panel opinion conflicts with the law of the circuits

This Court anticipated *Mauro* in a case cited with apparent approval in *Mauro* itself, *Mauro*, 436 U.S. at 349 n.14, 354 n.20, when it held that the IAD is not the only means of obtaining custody of a state prisoner. *See Kenaan*, 557 F.2d at 915-17. As *Kenaan* observed, the construction of the IAD urged by the defendant in that case (and by the panel here) "would impliedly repeal or modify the statute establishing the writ . . . with no mention whatever of the slightest congressional intent so to do." *Id.* at 917. The Court rejected that scenario: "§ 2241 remains viable, in our view, in its entirety." *Id.* The panel dismisses *Kenaan* as dicta without acknowledging this language. (A:8.) It also suggests (A:8) that *Kenaan* conflicts with *Mauro* or *United States v. Currier*, 836 F.2d 11 (1st Cir. 1987), when neither is the case.

As Judge Boudin notes (A:14), three circuits have expressly held post-*Mauro* that Article IV(a) does not give a governor a veto over the writ. *See United States v. Trafny*, 311 Fed. Appx. 92, 2009 WL 289713, *2-3 (10th Cir. 2009) (unpublished) (adopting reasoning of *Graham* and *Bryant* as "highly persuasive"); *United States v. Graham*, 622 F.2d 57, 59 (3d Cir. 1980) ("In light of this clear statement by the Supreme Court [in *Mauro*] that, in enacting Article IV(a), Congress did not intend to confer on state governors the power to disobey writs issued by federal courts as 'written requests for custody' under the Act, we conclude that the district court did not

err in denying Graham's motion to dismiss the indictment"); *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 Act to reject a federal writ of habeas corpus *ad prosequendum* that serves as such a request, as the Supreme Court noted in *Mauro*"); *cf. United States v. Ford*, 550 F.2d 732, 736-42 (2d Cir. 1977), *aff'd sub nom. Mauro*, 436 U.S. at 363.

As the panel says in a footnote (A:7), these cases had a different procedural posture from the present case. The defendants there claimed that they were entitled to an *opportunity* to persuade their governors to dishonor the writ. But that distinction hardly diminishes the potency or relevance of the cases. Each directly contradicts the panel opinion by holding that the IAD cannot trump the writ given *Mauro*.

No court has held to the contrary until now. The closest support that the panel can cite is *United States v. Sheer*, 729 F.2d 164 (2d Cir. 1984). *Sheer* merely assumes – in dicta and incorrectly – that the 30-day waiting period in Article IV(a) applies to the United States. *Sheer*, 729 F.2d at 170. As Judge Boudin notes, one judge in *Sheer* stated that she could not subscribe to "this obiter proposition" in light of *Mauro*. *Sheer*, 729 F.2d at 172 (Kearse, J., concurring). Moreover, as the district court recognized (A:17), the 30-day period has long since passed here. Thus, the *Sheer* dicta is of academic interest only. Even assuming *arguendo* (and incorrectly) that the writ

may be *delayed*, it may not be refused outright.

III. The panel opinion fails to account for the historical and practical importance of the writ

Federal courts have long had broad powers to issue writs of habeas corpus *ad testificandum* and *ad prosequendum* when "necessary to bring [a prisoner] into court to testify or for trial." 28 U.S.C. § 2241(c)(5); *Mauro*, 436 U.S. at 357-58; *Carbo v. United States*, 364 U.S. 611, 614-22 (1961); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94-99 (1807). "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 357-58.

As Judge Boudin observes, the writ "long predated the IAD." (A:12.) Writs of habeas corpus *ad prosequendum* and *ad testificandum* were readily available at common law "when it [was] necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed." William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Clarendon Press, 1765-69), 3:130. Moreover, the Supreme Court has taken special notice of the fact that an early version of the *ad prosequendum* writ was enshrined in Section 14 of the First Judiciary Act, 1 Stat. 81-82 (1789). *See Mauro*,

436 U.S. at 357; *Carbo*, 364 U.S. at 613-15; *Ex parte Bollman*, 8 U.S. at 95. Section 2241(c)(5) codified both writs in their present form over sixty years ago, in 1948. *See Mauro*, 436 U.S. at 358; *United States v. Larkin*, 978 F.2d 964, 968 (7th Cir. 1992).

Once issued, an *ad prosequendum* writ is "executed immediately." *Mauro*, 436 U.S. at 360. Compliance is mandatory: "Upon receipt of such a writ, state authorities deliver the prisoner in accordance with its terms and in compliance with § 2241." *Kenaan*, 557 F.2d at 916.

The consequences of inviting challenges to the writ are potentially significant. Thirty-three years ago, the Supreme Court noted that "during a typical year federal courts issue approximately 5,000 *ad prosequendum* writs and that about 3,000 of those are in cases in which a detainer has previously been lodged against the prisoner." *Mauro*, 436 U.S. at 364 n.29. If writs could be dishonored or delayed, this would pose a serious threat to the proper functioning of the criminal justice system. One reading of the panel opinion is that, every time the government lodges a detainer and seeks the writ, there is a mandatory 30-day waiting period during which inmates could try and persuade their governors to refuse transfer. (A:9-10.) Allowing governors to review every such case not only would delay prosecutions, but would mark a radical shift of power from the federal government to the states.

IV. The panel opinion is at odds with the Supremacy Clause

The panel opinion cannot be reconciled with the Supremacy Clause. Under it, a federal writ may be flouted and federal prosecutions delayed indefinitely at the whim of a state governor, while witnesses die or become unavailable and memories fade. Absent clear proof that Congress intended such a strange surrender of federal power – and here there is none – the writ must prevail. *Cf. Washington v. Wash. 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"); *Fay v. Noia*, 372 U.S. 391, 403 n.11 (1963) ("the issuance of writs of habeas by the federal courts is, rather, an aspect of the supremacy of federal law"); *Ex parte Royall*, 117 U.S. 241, 249 (1886) (that a state court "cannot . . . discharge from custody persons held by [federal] authority . . . results from the supremacy of the constitution and laws of the United States"); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 514-26 (1858) (state court had no right to custody of person detained on federal charges given Supremacy Clause); *see also* Judge Boudin's dissent at A:13-14.

Although the refusal to transfer custody here is based on a governor's opposition to capital punishment, the panel opinion creates the potential for federal-state conflicts in other subject areas. Imagine the governor who disagrees with federal

drug penalties or who thinks that marijuana should be legalized, or the governor who believes certain federal gun laws violate the Second Amendment. Armed with the panel opinion, such a governor will feel emboldened to veto the writ in such cases.

The panel's solution – just refrain from using detainers – is untenable. (A:10.) Without detainers the government would have to devise a new and potentially cumbersome system for keeping track of state inmate release dates – dates that can change with little notice. In many cases the inmate's status changes quickly: he may enter state prison as an unsentenced arrestee, have his parole revoked and become sentenced, and then persuade the parole board to reduce or suspend the sentence, unbeknownst to the government. Without the safeguard of a detainer, there would be a substantial risk that some inmates would slip through the cracks and vanish.

Finally, the panel states that: (1) the government is seeking "authorization to kill Pleau"; (2) the crimes here "are quintessential state crimes, and betray on their face no hint of any uniquely federal interest"; and (3) Pleau was allegedly poised to plead guilty in the state system and accept a sentence of life without possibility of parole, so "it is frankly unclear what is to be gained from pursuing federal charges in this case, particularly in light of the truly extraordinary costs of capital litigation." (A:5.) The government disagrees with each characterization, but the third deserves comment. The third assertion is based on a non-binding letter that Pleau's attorney

sent to state prosecutors just before the federal government sought his custody. If the federal prosecution is blocked and the state charges Pleau with murder (no state charges are pending), he may reconsider his offer to plead guilty and to stipulate to a life-without-parole sentence – a concession that no Rhode Island defendant has ever made to the government's knowledge.

CONCLUSION

For these reasons, the panel or the en banc Court should rehear this matter, vacate the panel opinion, and deny the writ of prohibition sought by the Governor and Pleau. The district court's *ad prosequendum* writ should be enforced and the federal prosecution should be permitted to proceed.

Respectfully submitted,

PETER F. NERONHA
United States Attorney

/s/ Donald C. Lockhart

DONALD C. LOCKHART
Assistant U.S. Attorney

CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitations in Fed. R. App. P. 35(b)(2) because it contains 15 pages excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

2. This brief complies with the typeface rule in Fed. R. App. P. 32(a)(5) and the type style rule in Fed. R. App. P. 32(a)(6) because it uses a proportionally spaced, serif typeface (*i.e.*, Times New Roman) in 14-point font.

/s/ Donald C. Lockhart

DONALD C. LOCKHART
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Dated: November 9, 2011

CERTIFICATE OF SERVICE

I certify that on November 9, 2011, I electronically served a copy of the foregoing filing on the following registered participants of the CM/ECF system:

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Addendum Table of Contents

--- F.3d ----, 2011 WL 4865159 (C.A.1)
(Cite as:)

UNITED STATES OF AMERICA, Appellee,
v.
JASON WAYNE PLEAU, Defendant, Appellant.

No. 11–1775

United States Court of Appeals, First Circuit.
October 13, 2011

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND No. 11–1782 IN RE: JASON WAYNE PLEAU, Petitioner. PETITION FOR A WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND
[Hon. William E. Smith, *U.S. District Judge*]
Robert B. Mann, with whom *Mann & Mitchell, David P. Hoose,* and *Sasson, Turnbull & Hoose,* was on brief for appellant-petitioner.

Claire Richards, Chief Legal Officer, on brief for amicus curiae Governor Lincoln D. Chafee in support of appellant-petitioner.

Donald C. Lockhart, Assistant United States Attorney, with whom *Peter F. Neronha,* United States Attorney, was on brief for appellee.

Before Torruella, Boudin, and Thompson, *Circuit Judges.*

TORRUELLA, *Circuit Judge.*

Petitioner Jason Wayne Pleau is accused of the armed robbery and murder of a gas station manager in Rhode Island. Pleau is currently serving an eighteen-year sentence in Rhode Island state prison for parole and probation violations, and has agreed to plead guilty to state charges stemming from the robbery and murder and to accept a sentence of life imprisonment without the possibility of parole. The issue presented in the current petition is whether the United States, after being rebuffed by the state of Rhode Island in its attempt to take custody of Pleau under the Interstate Agreement on Detainers (IAD), 18 U.S.C.App. § 2, may compel the same result by means of a writ of habeas corpus *ad prosequendum.* The issue is brought to us accompanied by a statement by Rhode Island Governor Lincoln Chafee that he would not transfer Pleau to federal custody because doing so would expose Pleau, a Rhode Island citizen, to a potential death sentence on federal charges, in contravention to Rhode Island's long-standing rejection of capital punishment.

The petition presents a question of first impression in this court, as it appears that never before has a state governor denied a federal request for custody under the IAD. For the reasons stated below, we hold that the federal government is entitled to choose between the IAD and an *ad prosequendum* writ in seeking custody of a state prisoner for purposes of a federal prosecution, but that once the federal government has put the gears of the IAD into motion, it is bound by the IAD's terms, including its express reservation of a right of refusal to the governor of the sending state.

I. Background.

A. Facts & procedural posture.

On September 20, 2010, Pleau, along with two others, allegedly robbed a Woonsocket, RI gas station manager who was on his way to the bank to deposit the day's receipts. Pleau is alleged to have shot the victim, David Main, to death during the robbery. On November 18, 2010, the United States filed a criminal complaint in the United States District Court for the District of Rhode Island, and an arrest warrant was issued. Shortly thereafter, on November 22, the United States Marshals Service lodged a detainer with the warden of Rhode Island's Adult Correctional Institution, High Security Unit in Cranston, Rhode Island, where Pleau is currently serving a sentence for parole and probation violations. Pleau and his alleged cohorts were then in-

dicted for robbery affecting interstate commerce, 18 U.S.C. § 1951(a); conspiracy to commit robbery affecting interstate commerce; and possessing, using, carrying, and discharging a firearm in relation to a crime of violence, 18 U.S.C. §§ 924(c)(1)(A) and (j)(1). The indictment noted that Pleau and his co-defendants are eligible for the death penalty, and specified statutory aggravating factors.

In order to facilitate Pleau's prosecution under the federal indictment, the district court entered an order transmitting the United States' request for temporary custody of Pleau under the IAD on May 25, 2011. Approximately one month later, Rhode Island Governor Lincoln Chafee denied the request for custody, citing Article IV(a) of the IAD, which states, in pertinent part, that after a request for temporary custody has been made, "there shall be a period of thirty days ... 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). Pursuant to 28 U.S.C. § 2241(c)(5), the federal government then petitioned the district court for a writ of habeas corpus *ad prosequendum*, a form of habeas used to secure a defendant's presence in court. Pleau filed a motion opposing the request on the same day.

On June 30, the district court granted the Government's request, holding that Pleau lacked standing to challenge the issuance of the writ and denying his claim on the merits as well. The district court, noting that "[i]t appears that this is the first time a governor has dishonored a request by the United States" under the IAD, held that when the IAD "has been invoked and a detainer lodged against a state prisoner, Article IV may afford the governor of the sending State the right to dishonor the request to transfer ... but, in all events does not empower him, or his agents, to disobey a federal court's writ of habeas corpus *ad prosequendum* as to that prisoner." *United States v. Pleau*, No. CR. 10–184–1S, 2011 WL 2605301, at *3 (D.R.I. June 30, 2011). The court issued the writ requiring Pleau's presence in federal court on Friday, July 8, 2011 at 11:00 a.m. for arraignment.

Pleau filed a motion in this court to stay execution of the writ as well as a motion seeking a writ of prohibition. On July 7, 2011, we granted a stay, directing the parties to file briefs and setting the case for oral argument. Governor Chafee appeared before this court first as an *amicus curiae* supporting Pleau, and later as an intervenor-appellant.

B. The IAD and habeas corpus *ad prosequendum*

Before turning to the merits, we briefly sketch the background of the IAD and *ad prosequendum* writs, as well as the standards governing the use of writs of mandamus and prohibition.

The IAD, adopted by Congress in 1970, is an agreement between forty-eight states, the District of Columbia, Puerto Rico, the Virgin Islands, and the United States. *United States v. Currier*, 836 F.2d 11, 13–14 (1st Cir.1987). The IAD was intended to "encourage the expeditious and orderly disposition" of outstanding charges against a defendant based on untried indictments, informations, or complaints from multiple 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).

To obtain custody under the IAD, the requesting state must first file a "detainer" with the state with custody, notifying the custodial state of the untried charges pending against the prisoner. *See United States v. Kenaan*, 557 F.2d 912, 915 (1st Cir.1977) ("A detainer is a formal notification, lodged with the authority under which a prisoner is confined, advising that the prisoner is wanted for prosecution in another jurisdiction."). To actually obtain custody, the requesting state must additionally file with the sending state a written request for custody, at which point the latter state has thirty days in which to determine whether to honor the request. 18 U.S.C.App. § 2, art. IV(a); *Mauro*, 436

U.S. at 351–52.

Like requests for custody under the IAD, writs of habeas corpus *ad prosequendum* are creatures of statute. *Ad prosequendum* writs were first interpreted as arising out of the First Judiciary Act, 1 Stat. 81–82 (1789), by Chief Justice Marshall in *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 98 (1807). In that case, Chief Justice Marshall distinguished varieties of habeas, describing habeas corpus *ad prosequendum* as the form of the writ "which issue[s] when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed." *Id.* The present-day writ arises under 28 U.S.C. § 2241(c)(5). *See Kenaan,* 557 F.2d at 916 ("A federal writ of habeas corpus [*ad prosequendum*] under § 2241 is ... a federal court order, commanding the presentation of a prisoner for prosecution or as a witness in a federal court. It is judicially controlled by the federal district court, which may issue it for the production of a prisoner when 'it is necessary to bring him into court to testify or for trial.' " (quoting 28 U.S.C. § 2241(c)(5))). *See also Carbo v. United States,* 364 U.S. 611, 613–20 (1961) (discussing the history of *ad prosequendum* writs).

C. Writs of prohibition.

The All Writs Act, 28 U.S.C. § 1651(a), empowers federal courts to issue extraordinary (or "prerogative") writs where "necessary or appropriate in aid of their respective jurisdictions." Writs of mandamus instruct lower courts to take certain specified acts; writs of prohibition instruct them to refrain from doing so. *See In re Perry,* 859 F.2d 1043, 1044 n.1 (1st Cir.1988); *In re Pearson,* 990 F.2d 653, 656 (1st Cir.1993). As such, writs of mandamus and writs of prohibition are mirror images of each other, and "derive from the same statutory basis and incorporate the same standards." *In re Justices of the Superior Court Dep't of the Mass. Trial Court* (*In re Mass. Trial Court*), 218 F.3d 11, 15 n.3 (1st Cir.2000). We therefore "make no distinction between them," *In re Atl. Pipe Corp.,* 304 F.3d 135, 138 n.1 (1st Cir.2002), and "will continue the practice of referring to them interchangeably." *In re Mass. Trial Court,* 218 F.3d at 15 n.3.

Like mandamus, a writ of prohibition is a "drastic remedy, to be used sparingly and only in unusual circumstances." *In re Mass. Trial Court,* 218 F.3d at 15 (internal quotation marks omitted). The standards for determining when it is appropriate to issue a writ of mandamus or prohibition reflect the writs' anomalous character. The First Circuit has acknowledged two subspecies of mandamus writs: supervisory and advisory. [FN1] Supervisory mandamus is used "to correct an established trial court practice that significantly distorts proper procedure." *United States v. Horn,* 29 F.3d 754, 769 n.19 (1st Cir.1994). This form of mandamus "is ordinarily appropriate in those rare cases in which the issuance (or nonissuance) of an order presents a question anent the limits of judicial power, poses some special risk of irreparable harm to the appellant, and is palpably erroneous." *Id.* at 769. Supervisory mandamus requires the petitioner to "show both that there is a clear entitlement to the relief requested, and that irreparable harm will likely occur if the writ is withheld." *In re Cargill, Inc.,* 66 F.3d 1256, 1260 (1st Cir.1995).

FN1. Although the cases discussing the supervisory/advisory distinction do so in the context of writs of mandamus, given that writs of prohibition are "merely the obverse" of writs of mandamus, *In re Atl. Pipe Corp.,* 304 F.3d at 138 n.1, we presume that the supervisory/advisory distinction applies in the context of writs of prohibition as well. *See, e.g., In re Sony BMG Music Entm't,* 564 F.3d 1, 9–10 (1st Cir.2009) (exercising our "advisory mandamus authority" to issue a writ "*prohibit[ing]* enforcement of the challenged order")(emphasis added).

By contrast, advisory mandamus is not directed at "established" practices, *Horn,* 29 F.3d at 769 n.19, but rather at resolving issues that are "novel,

of great public importance, and likely to recur." *Id.* at 769. A case may be fit for advisory mandamus when it presents a "systematically important issue as to which this court has not yet spoken." *In re Atl. Pipe Corp.*, 304 F.3d at 140; *see also In re Mass. Trial Court*, 218 F.3d at 15 n.4; *In re The Justices of the Supreme Court of P.R.*, 695 F.2d 17, 25 (1st Cir.1982) (recognizing advisory mandamus as appropriate when "[t]he issue presented is novel in this circuit, it is important, and ... may well recur before further appellate review is possible"). Advisory mandamus has its roots in the Supreme Court's acknowledgment that federal courts of appeal have "the power to review ... basic, undecided question[s]." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964); *see also* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L.Rev. 595, 596 (1972) (describing *Schlagenhauf* as holding that "in certain prescribed circumstances, the courts of appeals could properly decide 'novel and important' questions of law brought to them on petitions for mandamus").

III. Discussion

A. Standing.

As an initial matter, we note that Governor Chafee's intervention in the present appeal moots a simmering dispute between the original parties—Pleau and the United States—as to whether Pleau had standing to contest the issuance of the habeas writ. The district court noted that it is "axiomatic" that "a state prisoner is *without standing* to contest a federal court's issuance of a writ of habeas corpus *ad prosequendum.*" *Pleau*, 2011 WL 2605301, at *2 (emphasis in original) (internal quotation marks omitted) (quoting *Derengowski v. U.S. Marshal*, 377 F.2d 223, 223 (8th Cir.1967)). The district court rejected Pleau's argument, renewed on appeal, that the Supreme Court's recent decision in *Bond v. United States*, 131 S.Ct. 2355 (2011), implies that he does have standing as he is challenging "governmental action taken in excess of the authority that federalism defines," *id.* at 2363–64. *See Pleau*, 2011 WL 2605301, at *2.

The United States insists that Pleau does not have standing "to interfere with agreements (or disagreements) between executives concerning custody transfers," in part because a state prisoner "may not complain if one sovereignty waives its strict right to exclusive custody of him," as "[s]uch a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it." *Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922). At oral argument, the United States represented that if Pleau does not have standing, then this case is left with "no legitimate party."

However, Governor Chafee has since sought and been granted leave to intervene in this case in order to "fully vindicate his rights under the IAD." Governor Chafee, like Pleau, argues that once the United States has invoked the IAD, it may not later circumvent the IAD's express allocation of a right of refusal to the governor of the sending state by means of an *ad prosequendum* writ. Given that no one contests that Governor Chafee, as the representative of Rhode Island, has standing to raise such a claim, the concerns regarding whether Pleau does or does not have standing to challenge the issuance of the *ad prosequendum* are now moot, and we express no opinion on the merits of that issue.

B. Which writ?

The United States insists that Pleau's arguments [FN2] do not meet the standards for mandamus. The United States argues that Pleau cannot establish (a) that he is "clearly entitled" to relief, or (b) that he is likely to suffer irreparable harm. In mounting this argument, the United States evidently presupposes that the applicable writ is supervisory in character. However, as noted above, supervisory mandamus is directed at correcting "established" trial court practices. *Horn*, 29 F.3d at 769 n.19. The parties, as well as the district court, have represented that Governor Chafee's denial of the United States' IAD request for custody over Pleau—which precipitated the current appeal—is the first time that a state has denied an IAD request by the feder-

al government. The issue presented by this petition thus does not concern an established trial court practice, but is rather novel and a matter of first impression. It is thus more properly viewed under the rubric of advisory, rather than supervisory, prerogative writs.

> FN2. Because Governor Chafee's and Pleau's arguments are substantially similar, we treat them as one and the same.

The standard for an advisory writ of prohibition does not overlap with that for a supervisory writ. *See Horn,* 29 F.3d at 769 (recognizing that advisory mandamus may lie "even though *all* the usual standards [of supervisory mandamus] are not met") (emphasis added). It is therefore not incumbent upon Pleau to show irreparable harm or clear entitlement to relief. *See In re Sony BMG Music Entm't,* 564 F.3d 1, 4 (1st Cir.2009) ("When advisory mandamus is in play, a demonstration of irreparable harm is unnecessary."); *In re Atl. Pipe Corp.,* 304 F.3d at 139 (noting that a showing of a risk of irreparable harm and palpable error "typically apply only to *supervisory* mandamus") (emphasis in original). The applicable standard is, rather, whether the issue raised by Pleau is novel, of great or systemic importance, and likely to recur prior to effective review.

We believe the question presented meets all three criteria. Governor Chafee's denial of the United States' request for custody of Pleau appears to be unprecedented. The question of whether a state governor retains his or her prerogative under the IAD to deny a subsequent request for custody, even when that occurs under the guise of an *ad prosequendum* writ, has never been squarely considered by the First Circuit. Nor, for reasons we explain more fully below, is Supreme Court precedent dispositive on this point. The question raised by Pleau's petition is novel.

The question is also of great and systemic importance. As Governor Chafee made clear in a statement released on the same day as his denial of the IAD request, he opposes transferring Pleau to federal custody on grounds of Rhode Island's "longstanding policy" against capital punishment. While Governor Chafee's refusal to allow the federal government to seek the execution of a Rhode Island citizen "in no way minimize[s] the tragic and senseless nature" of Main's murder, he stated that he could not "in good conscience" allow the federal government to ride roughshod over Rhode Island's "conscious[ ] reject [ion]" of execution as an acceptable form of state punishment. Pleau had, at this point, already indicated his agreement to plead guilty to the state charges and accept a sentence of life without the possibility of parole. Therefore, the only additional punishment that a federal conviction might bring would appear to be authorization to kill Pleau. The present case thus presents a stark conflict between federal and state policy prerogatives on a matter of literally life-and-death significance. FN3

> FN3. We pause to note that the crimes Pleau is alleged to have committed—armed robbery and murder—are quintessential state crimes, and betray on their face no hint of any uniquely federal interest. *See United States v. Jiménez–Torres,* 435 F.3d 3, 14–15 (1st Cir.2006) (Torruella, J., concurring) (objecting to unwarranted extension of federal criminal jurisdiction over traditionally state crimes). Moreover, given that Pleau has already agreed to plead guilty to state charges and accept a life sentence without the possibility of parole, it is frankly unclear what is to be gained from pursuing federal charges in this case, particularly in light of the truly extraordinary costs of capital litigation.

Finally, given the unsettled character of the question presented, the numerous states and territories that are party to the IAD, and the fact that, as the United States has represented to us, thousands of *ad prosequendum* writs are issued each year**,** it is

not unreasonable to suspect that the question presented in the instant petition is likely to recur. Indeed, insofar as the United States is correct that the typical criminal defendant lacks standing to challenge the issuance of an *ad prosequendum* writ—whether issued before or after the invocation of the IAD—the question presented "may well recur before further appellate review is possible." *In re The Justices of the Supreme Court of P.R.*, 695 F.2d at 25.

Moreover, Governor Chafee's invocation of the IAD and intervention in this case present a unique opportunity for review of this slippery issue: the Governor unquestionably has standing, where Pleau might or might not. The Governor's standing, though, might evaporate if Pleau were transferred, in which case it is unclear what remedy might be available to the Governor. This means that on direct appeal, if Pleau also lacks standing to challenge his transfer under the IAD (as the United States insists) then this question will evade effective review.[FN4] In the end, we very well might not be able to consider this easily duplicable and important question if not now.

> FN4. Other cases, including *Mauro*, have addressed IAD questions on direct appeal, although always in the context of a prisoner asserting his own rights under the IAD, such as his speedy trial rights. *See, e.g.*, *Mauro*, 436 U.S. at 348; *New York v. Hill*, 528 U.S. 110, 118 (2000) (holding that the defendant's speedy trial right under the IAD had been waived). No case has ever addressed the IAD on appeal in the context of a prisoner standing in for a sending-state governor who refuses a transfer under Article IV of the IAD. *Cf.*, *e.g.*, *id.* at 118 n. 3 (recognizing that "the sending State may have interests distinct from those of the prisoner," and noting that the *Hill* case "does not involve any objection from the sending State"). We repeat that this situation is unique.

We conclude that Pleau's petition meets the standard for an advisory writ of prohibition. As prerogative writs such as writs of prohibition are discretionary rather than mandatory, we now turn to consider whether the writ should issue.

C. The merits.

Article VI, Clause 2 of the Constitution, otherwise known as the Supremacy Clause, states in part that "the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." As we have previously noted, a federal court's authority to issue a writ of habeas corpus *ad prosequendum* is grounded on a federal statute, 28 U.S.C. § 2241(c)(5). *Prima facie*, it might well be the case that a state's refusal to honor an *ad prosequendum* writ would normally raise serious issues under the Supremacy Clause.

However, that is not the case now before us. Governor Chafee has not asserted a free-standing right to ignore federal *ad prosequendum* writs. Governor Chafee asserts, rather, that he is authorized under Article IV(a)[FN5] of the IAD to decide whether to honor a request for custody made by a receiving state, and that an *ad prosequendum* writ that post-dates the invocation of the IAD is, under federal law, treated as just such a written request. We have previously explained that, as a "congressionally sanctioned interstate compact within the compact clause, the [IAD] is a federal law subject to federal construction." *Currier*, 836 F.2d at 13 (citation omitted). Therefore, the case now before us involves two federal statutes and the question of how they may be interpreted such that each is given effect in a manner that is consistent with the operation of the other.

> FN5. Section 2 of the Interstate Agreement on Detainers Act "sets forth the agreement as [originally] adopted by the United States and by other member jurisdictions." *Mauro*, 436 U.S. at 343 n. 1. Provisions of the Agreement will be referred to by their

article numbers as set forth in 18 U.S.C.App. § 2.

The United States insists that Pleau's petition has already been foreclosed by the Supreme Court's decision in *Mauro*, in which the Court stated that Article IV(a) of the IAD "does not purport to augment the State's authority to dishonor" an *ad prosequendum* writ, and that "[i]f 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. Several other circuits have subsequently arrived at similar conclusions. *See United States v. Trafny*, 311 F. App'x. 92, 95–96 (10th Cir.2009); *United States v. Graham*, 622 F.2d 57, 59–60 (3d Cir.1980); *United States v. Bryant*, 612 F.2d 799, 802 (4th Cir.1979).[FN6] *But see United States v. Scheer*, 729 F.2d 164, 170 (2d Cir.1984) (stating that "the historic power of the [*ad prosequendum*] writ seems unavailing once the government elects to file a detainer in the course of obtaining a state prisoner's presence for disposition of federal charges.")

FN6. Significantly, in none of these cases did the governor of the sending state actually disapprove the federal government's IAD request or seek to block transfer under a subsequent *ad prosequendum* writ. *See Trafny*, 311 F. App'x at 94 (state governor acquiesced in defendant's transfer to United States' custody within thirty days of the issuance of the *ad prosequendum* writ); *Graham*, 622 F.2d at 58 (same); *Bryant*, 612 F.2d at 801 (same)

We are not as confident that *Mauro* is quite as clear as claimed by the United States. After all, *Mauro* had two core holdings which were necessary to resolving the cases consolidated before the Court, and both of these holdings undermine rather than support the United States' position. First, the Court held that the United States is a party to the IAD not just as a sending state, but as a receiving one as well, and that it is therefore not exempt from the restrictions the IAD places on receiving states. *Mauro*, 436 U.S. at 354. Second, the Court held that while the federal government could choose to seek custody over a state prisoner by means of an initial habeas writ *or* under the IAD, once an effective IAD detainer had been lodged, "the Agreement by its express terms becomes applicable and the United States must comply with its provisions." *Id.* at 362. "[O]nce a detainer has been lodged," the Court noted, "the policies underlying the [IAD] are fully implicated," and thus there is "no reason to give an unduly restrictive meaning to the term 'written request for temporary custody.' " *Id.* Under these circumstances, "it clearly would permit the United States to circumvent its obligations under the Agreement to hold that an *ad prosequendum* writ may not be considered a written request for temporary custody." *Id.* Both of these holdings indicate that the United States stands, for purposes of the IAD, on an equivalent footing with other states, and that, once it has invoked the IAD, it is bound by the terms thereof, including Article IV(a).

Moreover, the interpretation of *Mauro* advanced by the United States is not in any way self-evident. First, the portion of *Mauro* cited by the United States occurs directly after the Court announced the rule that subsequent *ad prosequendum* writs are to be treated as written requests under the IAD. *See Mauro*, 436 U.S. at 362–63. We do not believe the portion of *Mauro* cited by the Government must be read as stipulating a somewhat mysterious and implicit carve out to the rule the Supreme Court had just announced. Rather, it is at least equally plausible to understand the *Mauro* majority as reaffirming that although states did not historically have the power to ignore federal habeas writs at will and were not granted that power by the IAD, nevertheless, under certain circumstances, what is ostensibly a federal *ad prosequendum* writ is in effect a request for temporary custody under the IAD, and—*under those circumstances*—subject to the restrictions imposed on such requests.

Second, *Mauro* 's suggestion that a governor

lacks the power to reject an *ad prosequendum* writ acting as a request for temporary custody under the IAD occurs only in a conditional phrase: "*If* a State has never had authority to dishonor an *ad prosequendum* writ issued by a federal court, then this provision could not be read as providing such authority." 436 U.S. at 363 (emphasis added). We do not read this conditional language as overriding *Mauro* 's clear holding that an *ad prosequendum* writ following a detainer is a "request for custody" subject to the IAD. Once the IAD is invoked, it applies in its entirety.

We have on one occasion suggested a contrary result in dicta. *See Kenaan,* 557 F.2d at 916 n.8. However, *Kenaan* 's dictum, which predates *Mauro,* has since been superseded by more recent authority. In *Currier,* we relied on *Mauro* for the proposition that "once 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." 836 F.2d at 14 (citing *Mauro,* 436 U.S. at 361–64). We did not rely on *Mauro* for the proposition that any subsequent *ad prosequendum* writ is equivalent to a request for temporary custody—except as to Article IV(a). Our language in *Currier* was clear and without qualification, and it plainly follows therefrom that subsequent *ad prosequendum* writs are, qua IAD requests, subject to the sending state's right of refusal under Article IV(a) of the IAD. Although *Currier* is distinct insofar as the governor in that case did not seek to challenge a subsequent *ad prosequendum* writ, we nevertheless note that *Currier* 's interpretation of *Mauro* remains good law in this circuit.

Our result is further borne out by longstanding principles of statutory interpretation. First, we note that the IAD specifically excepts the United States from certain requirements, but not from a governor's right to refuse a transfer. The maxim *expressio unius est exclusio alterius* comes to mind: in determining the effect of an amendment to existing statutory law, "[e]xceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:23 (7th ed.2010). In the context of the IAD, Congress amended the IAD after *Mauro* to add specific exceptions treating the United States differently from other parties.[FN7] Pub.L. No. 100–960, Title VII, § 7059, 102 Stat. 4403 (1988) (codified at 18 U.S.C.App. § 9). Aside from these enumerated exceptions, though, Congress has stuck with the IAD's definition of the United States as a "state" on the same footing as other receiving states. *See Mauro,* 436 U.S. at 354; *see also* 18 U.S.C.App. § 2, art. II. Because Congress specifically amended the IAD to add these express exceptions, we can safely deduce that Congress did not intend to make any others. *See Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 188 (1978) (concluding that under maxim *expressio unius est exclusio alterius,* enumerated exceptions are the only exceptions intended within the Endangered Species Act); *see also Alabama v. Bozeman,* 533 U.S. 146, 153 (2001) (concluding that "the language of the [IAD] militates against an implicit exception, for it is absolute").

> FN7. For example, if a receiving state other than the United States does not hold a trial before returning the person to the sending state, the "indictment, information or complaint" from the receiving state "shall" be dismissed with prejudice. 18 U.S.C.App. § 2, art. IV(e). In contrast, under § 9 of the IAD, "Special provisions when United States is a Receiving State," if the United States is the receiving sate, then the dismiss of the "indictment, information or complaint *may be with or without* prejudice." 18 U.S.C.App. § 9(1) (emphasis added). Section 9 does not indicate that the United States can disregard or override a sending state's denial of its request for temporary custody.

Second, notwithstanding the United States' argument that the IAD's purpose compels deviation from its plain language, it is axiomatic that we must

apply the statute as written. *See Carchman v. Nash,* 473 U.S. 716, 729 (1985) (rejecting an interpretation of the IAD that would elevate its purposes over its plain language); *see also Bozeman,* 533 U.S. at 153 (noting that in the IAD, as elsewhere, the word "shall" indicates a command). The IAD plainly mandates that a governor be allowed to reject a transfer request, so we must give effect to that command regardless of the statute's stated purpose. FN8

FN8. The IAD unambiguously states: "there *shall* be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request." 18 U.S.C.App. § 2, art. IV(a). The United States argues that this thirty-day period has no practical import—that a prisoner can readily be transferred within the thirty days whether the sending-state governor approves, acquiesces, or disapproves. We reject this interpretation, which would render the mandatory thirty-day period meaningless. *See United States v. Ven–Fuel, Inc.,* 758 F.2d 741, 751–52 (1st Cir.1985) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.").

Indeed, in an earlier line of cases, we tried deviating from the IAD's language in order to comport with its purpose, but the Supreme Court abrogated the entire line. *See United States v. Kelley,* 402 F.3d 39, 42 (1st Cir.2005) (stating that there can be "no exceptions to finding violations of the IAD for 'technical' or 'de minimis' missteps" and recognizing that *Bozeman* overruled our earlier contrary holdings); *see also Bozeman,* 533 U.S. at 152–56. Because the IAD provides that a sending-state governor may refuse to transfer a prisoner, and because Congress specifically excepted the United States from IAD provisions not including this one, the United States must honor a governor's denial of its request. It is, after all, a request, not an order or a mandate.

One last note remains to be sounded. The United States has argued that even if Article IV(a) governs *ad prosequendum* writs issued after invocation of the IAD, nevertheless disapproval of a written request under the IAD "may be premised only upon the requesting sovereign's failure to comply with IAD rules that are designed to safeguard the process and assure that the request is genuine." The United States insists that Governor Chafee's objection to the transfer of Pleau on grounds of Rhode Island's abhorrence of the death penalty is "not a valid basis" for refusing the request, and that allowing a governor to refuse an IAD request on public policy grounds "would be directly at odds with the IAD's goal of ensuring fast and orderly transfers." The United States cites no cases in support of this proposition, but rests its argument on the statutory text, which states that a requesting sovereign "*shall be entitled* to have a prisoner against whom he has lodged a detainer ... made available." 18 U.S.C.App. § 2, art. IV(a) (emphasis added).

The United States' textual argument is unconvincing. It is true that Article IV(a) states that a requesting sovereign "shall be entitled" to have a prisoner made available to him after a detainer has been lodged. However, the United States neglects to mention that a few lines later, Article IV(a) explicitly qualifies this statement, and states that this is "*provided* ... [t]hat there shall be a period of thirty days ... within which period the Governor of the sending State may disapprove the request for temporary custody or availability." 18 U.S.C.App. § 2, art. IV(a). *See also Mauro,* 436 U.S. at 363 n.28 (noting that the IAD retained a governor's right to refuse a transfer request on public policy grounds). It is uncontroversial that a governor may block a prisoner's transfer to a receiving state other than the United States, and we have already explained why Article IV(a) applies with equal force

to the United States. As to the issue of timeliness, the IAD specifies a thirty-day time frame for a governor to decide whether or not to grant the request, and so long as a decision is rendered in that time frame, it is entirely unclear how it would matter to the speed of a transfer what reason a governor had for accepting or rejecting a transfer request.

The United States' attempt to circumvent the IAD with an *ad prosequendum* writ weighs in favor of our rejection of its claim for physical custody of Pleau. In *RaShad v. Walsh,* 300 F.3d 27 (1st Cir.2002), we held that Massachusetts was negligent in failing to lodge a detainer with Texas after Massachusetts had indicted a Texas prisoner, even though the IAD does not explicitly require a receiving state to lodge a detainer with a sending state. *Id.* at 37. We reasoned that "[h]olding otherwise would allow a state to circumvent the IAD with impunity." *Id.* at 37–38. We also noted that there was no evidence Massachusetts deliberately tried to circumvent the IAD; therefore, the only import of Massachusetts's failure was to "cut[ ] in favor of the petitioner's speedy trial claim." *Id.* at 37. Here, the United States has gone much further. It has been seeking an *ad prosequendum* writ specifically in order to dishonor Governor Chafee's denial of its request for custody, as was his right under the IAD. If Massachusetts's inadvertent disregard for the IAD hurt its case, the United States certainly cannot base its claim for custody of Pleau on a blatant attempt to sidestep the IAD—a federal law that the United States itself invoked when it filed a detainer with the state of Rhode Island. The logic of *RaShad* applies with even greater force where the state (i.e. the United States) in violation of the IAD is the one that invoked it in the first place by filing a detainer. To grant the United States custody of Pleau "would allow [the United States] to circumvent the IAD with impunity." *Id.* at 37–38.

For these reasons, we hold that once the federal government has elected to seek custody of a state prisoner under the IAD, it is bound by that decision. 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. The federal government is not required to seek custody under the IAD; it may elect to seek custody by means of a habeas writ. In that case, the Supremacy Clause requires states to conform to the habeas writ. But once the federal government has chosen to proceed under the auspices of the IAD, it may not seek to erase the memory of that decision by means of an ensuing habeas writ. FN9

FN9. The dissent implies that our result would effectively "empower[ ] a state governor to veto a federal court habeas writ," which Congress never intended to do. *See* Diss. Op. at 1. Respectfully, this criticism misapprehends the scope of our holding. We do not hold that a state has a general right to disregard a properly granted *ad prosequendum* writ; such a broad holding would conflict with the Supremacy Clause and with the Supreme Court's statement in *Mauro* that "[t]he proviso of Art. IV(a) does not purport to augment the State's authority to dishonor [an *ad prosequendum*] writ." 436 U.S. at 363. Rather, we hold that *in the circumstances present here,* the United States gave up its right to seek an *ad prosequendum* writ. The question is not, as the dissent suggests, what Congress empowered the various states to do; rather, the question is what Congress *bound the United States to do.* By passing the IAD, Congress obligated the United States to choose either the IAD mechanism or the *ad prosequendum* mechanism and then accept the consequences of that choice. Thus, when the United States invoked the IAD to gain custody of Pleau, it lost its right to seek an *ad prosequendum* writ simply because it was dissatisfied with the result of the IAD process. Holding the United States to an agreement that was accepted by Con-

gress neither violates the Supremacy Clause nor upsets the post-Civil War balance of power between the states and the federal government. *Contra* Diss. Op. at 35–36.

> Indeed, the federal government may "waive the federal sovereign's strict right to exclusive custody of a prisoner" in favor of state custody. *Poland v. Stewart,* 117 F.3d 1094, 1098 (9th Cir.1997) (tracking the language of *Ponzi,* 258 U.S. at 260). Such a waiver is merely a specific manifestation of the general rule that the federal government may waive its sovereignty, either through executive acts, *see, e.g., City of Newark v. United States,* 254 F.2d 93, 95 n.1 (3rd Cir.1958) (citing *The Siren,* 74 U.S. (7 Wall.) 152, 154 (1868), for the principle that "whenever the United States brings an action as plaintiff, it waives its sovereignty and assumes the status of a private individual for the purposes of counterclaim or defenses"), or legislative acts, *see, e.g., United States v. Nordic Village, Inc.,* 503 U.S. 30, 34 (1992) (noting that the Federal Tort Claims Act creates "sweeping" waiver of federal sovereign immunity). The IAD creates a legislative waiver of federal sovereignty in the prisoner-custody context by defining the federal government as a state, subject to certain exceptions. And to the extent a state acts in accordance with a federal law that includes a waiver of sovereignty, it can hardly be said to offend the Supremacy Clause.

IV. Conclusion

As we have recently noted, prerogative writs such as mandamus and prohibition "are strong medicine and ... should be dispensed sparingly." *In re Sony BMG Music Entm't,* 564 F.3d at 4. However, that should not be taken to imply that the writ "has fallen into desuetude." *Horn,* 29 F.3d at 770 n.20. Indeed, just two years ago, we issued an advisory writ enjoining a district court from broadcasting on the internet a non-evidentiary motions hearing in a copyright infringement case. *See In re Sony BMG Music Entm't,* 564 F.3d at 9–10. The novel and challenging issues presented in the present case are at least as important. In light of Governor Chafee's exercise of his right of refusal enshrined in Article IV(a) of the IAD, we issue a writ of prohibition instructing the parties that the June 30, 2011 writ of habeas corpus *ad prosequendum* is to be treated in every respect as a written request for temporary custody under the IAD, and that the United States is bound by the IAD's terms, including the governor's right to refuse a transfer request.[FN10]

> FN10. Pleau seeks an interlocutory appeal in addition to or alternatively to the writ of prohibition. Because we issue the writ, we need not address Pleau's request for interlocutory review.

Petition granted.

–Dissenting Opinion Follows- BOUDIN, *Circuit Judge,* dissenting. 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. Of course, Congress has not provided states with any such veto power, and the Supreme Court has already made this clear in *United States v. Mauro,* 436 U.S. 340 (1978).

A federal grand jury indicted Jason Pleau on December 14, 2010, charging him with federal felonies[FN11] related to the September 20, 2010, robbery and murder of a gas station manager making a bank deposit in Woonsocket, Rhode Island. Pleau was in Rhode Island state custody on parole violation charges when the indictment came down, and is now serving an 18–year sentence there for parole and probation violations.

FN11. Conspiracy to commit robbery affecting commerce, 18 U.S.C. § 1951(a) (2006), robbery affecting commerce, *id.*, and use of a firearm during and in relation to a crime of violence resulting in death, *id.* § 924(c)(1)(A), (j)(1).

To secure Pleau's presence in the federal prosecution, the federal government invoked the Interstate Agreement on Detainers Act ("IAD"). Pub.L. No. 91–358, 84 Stat. 1397 (1970) (codified as amended at 18 U.S.C. app. 2 § 2 (2006)). The IAD provides what is supposed to be an efficient shortcut to achieve extradition of a state prisoner to stand trial in another state or, in the event of a federal request, to make unnecessary the prior custom of a federal habeas action to secure the state prisoner for a federal prosecution. *See* IAD art. I. In this instance, Rhode Island's governor refused the IAD request because of his stated opposition to capital punishment. *United States v. Pleau,* No. 10–184–1S, 2011 WL 2605301, at *2 n.1 (D.R.I. June 30, 2011).

The federal government then sought a writ of habeas corpus *ad prosequendum* from the district court to secure custody of Pleau—this being the traditional method by which a federal court obtained custody in such situations. *E.g.*, *Carbo v. United States,* 364 U.S. 611, 615–16, 618 (1961). The federal habeas statute codifying this common law practice authorizes the writ to be issued by a federal court to secure a person, including one held in state custody, where "necessary to bring him into [federal] court to testify or for trial." 28 U.S.C. § 2241(c)(5) (2006). This habeas statute, currently in force, long predated the IAD, *Carbo,* 364 U.S. at 614–19.

Pursuant to the habeas statute, the federal district court in Rhode Island ordered Pleau to be delivered into federal custody. *Pleau,* 2011 WL 2605301, at *4. Pleau, who at that stage had no standing under existing precedent to challenge the writ, FN12 nevertheless appealed and petitioned this court for a writ of prohibition to bar the district court from enforcing the habeas writ. Over a dissent, the panel majority granted a stay of the habeas writ and Pleau remains today in state custody many months after the government first sought his appearance in federal court. Unless he is produced, he cannot be tried on the federal charges.

FN12. *E.g.*, *Weekes v. Fleming,* 301 F.3d 1175, 1180 n.4 (10th Cir.2002), *cert. denied,* 537 U.S. 1146 (2003); *Weathers v. Henderson,* 480 F.2d 559, 559–60 (5th Cir.1973) (per curiam); *Derengowski v. U.S. Marshal, Minneapolis Office, Minn. Div.*, 377 F.2d 223, 223–24 (8th Cir.), *cert. denied,* 389 U.S. 884 (1967); *United States v. Horton,* No. 95–5880, 1997 WL 76063, at *3 (4th Cir. Feb. 24, 1997) (per curiam) (unpublished).

An expedited appeal followed in which the Rhode Island governor was granted belated intervention. The panel majority has now held that the state's refusal to grant consent under the IAD effectively disables as well the grant of the subsequently filed traditional habeas corpus *ad prosequendum* writ. This conclusion is remarkable both because *Mauro* held that lack of state consent would not affect the force of the habeas writ vis-à-vis the state and because it effectively thwarts a federal prosecution authorized by the United States Attorney and a federal grand jury.

Were the panel's position to prevail, Pleau could be permanently immune from federal prosecution. He is currently serving an 18–year term in Rhode Island prison and, if exempted now from answering the federal charges in the district court, could well agree to a life sentence under Rhode Island law for the robbery and murder. *See* Br. for Amicus Curiae Governor Lincoln D. Chafee in Support of Pet'r Ex. A (letter from Pleau to Rhode Island Assistant Attorney General offering to plead to sentence of life without parole on state charges). Even if the term remains at 18 years, one could hardly count on necessary witnesses being available for federal prosecution two decades from now. In-

stead of a place of confinement, the state prison has been made a refuge against the federal courts.

To reach this result, the panel majority has circumvented standing limitations on the power of a defendant to challenge the writ, *see* note 12, above, as well as ordinary practice generally reserving prohibition and mandamus writs for clear error by the district court. *E.g.*, *In re City of Fall River, Mass.*, 470 F.3d 30, 32 (1st Cir.2006). But, passing all that, on the core issue the panel decision adopts a reading of the federal statutes that disregards an *explicit contrary determination* by the Supreme Court in *United States v. Mauro*, 436 U.S. 340 (1978), on the relationship between the writ and the IAD.

Mauro disposed of two different federal appeals but, in the one most pertinent to Pleau, the background is easily summarized. The federal government lodged a detainer with state prison authorities, and then summoned the defendant from state prison to federal court by habeas writ, first for arraignment and (after many postponements) then for trial. The defendant repeatedly objected that he was being denied the speedy trial rights expressly protected by Article IV(c) of the IAD once its procedures have been invoked. 436 U.S. at 345–48.

After the defendant's federal conviction, the circuit court held that he had indeed been denied the speedy trial protections of the IAD, requiring dismissal of the federal indictment with prejudice. The Supreme Court agreed, saying that the detainer had triggered the IAD and the habeas writ comprised a "written request" for initiating a transfer contemplated by Article IV of the IAD. *Mauro*, 436 U.S. at 361–64. The fact that the writ had been used as part of the IAD process, the Court held, did not negate the IAD's express time limitations and sanction for ignoring them.

The Court went on, however, to expressly reject 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. Indeed, the Court distinguished between the time limits of Article IV(c) triggered by the detainer and Article IV(a)'s reservation of the governor's power to withhold consent. The former represented Congress' concern about delays in the IAD procedure, which could adversely affect the defendant subject to the detainer, whether invoked by the federal government or a state.

By contrast, the latter reservation merely preserved for the holding state its traditional authority to refuse an extradition request from another state, *Mauro*, 436 U.S. at 363 & n.28; it did not curtail whatever authority the writ traditionally gave the federal court to insist on the production of a defendant contrary to the wishes of the state. In fact, in *Mauro* the federal government had argued that applying the time limits to it could allow a governor to invoke Article IV's consent provision to a federal writ used after a detainer had been filed. The Court answered:

> We are unimpressed. The proviso of Art. IV(a) does not purport to augment the State's authority to dishonor such a writ. As the history of the provision makes clear, it was meant to do no more than 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.

Id. at 363 (internal footnote omitted).

That "a state has never had authority to dishonor an *ad prosequendum* writ issued by a federal court" is patent. The habeas writ has been codified by Congress, and under the Supremacy Clause, U.S. Const. art. VI, cl. 2, Congress' power trumps any contrary position or preference of the state. This principle has been regularly and famously used to compel states, including their governors, to respect orders of federal courts in civil rights cases such as *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958), and *United States v. Barnett*, 376 U.S. 681 (1964).
FN13 State interposition to defeat federal authority

is a doctrine that was thought to have vanished with the Civil War. *E.g.*, *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

> FN13. And this fundamental tenet of constitutional law is, of course, not confined to the civil rights context. *E.g.*, *Puerto Rico* v. *Branstad*, 483 U.S. 219, 227–29 (1987); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695–96 (1979); *Sterling v. Constantin*, 287 U.S. 378, 397–98 (1932); *Ex Parte Young*, 209 U.S. 123, 167–68 (1908).

That the federal statutory habeas *ad prosequendum* writ overrides any state power to withhold the defendant has been affirmed by three circuits with which the panel majority now conflicts. *United States v. Graham*, 622 F.2d 57, 59 (3d Cir.), *cert. denied*, 449 U.S. 904 (1980); *United States v. Bryant*, 612 F.2d 799, 802 (4th Cir.1979), *cert. denied*, 446 U.S. 919 (1980); *Tranfy v. United States*, 311 F. App'x 92, 95–96 (10th Cir.2009) (unpublished). A Second Circuit dictum, *United States v. Scheer*, 729 F.2d 164, 170 (2d Cir.1984), to the extent it suggests otherwise, was properly criticized as a misreading of *Mauro*. *Id.* at 172 (Kearse, J., concurring).

Mauro did not hold, as the panel majority supposes, that the filing of a detainer with state authorities disempowers the habeas writ or gives the governor a veto over its use; the Court, in the indented passage quoted above, said *exactly* the opposite. Nor do general canons of construction allow a lower court panel majority to disregard the Supreme Court's own construction of the IAD, namely, that "[t]he proviso of Art. IV(a) does not purport to augment the State's authority to dishonor such a writ." 436 U.S. at 363.

Here, a valid writ has been approved by a federal district court but is now effectively dishonored by the state and by the panel majority's writ of prohibition declaring that the governor is entitled to disregard the writ. *Mauro* is plainly to the contrary, and the panel majority's action cannot survive the inevitable further review now fated for it.

C.A.1,2011.
UNITED STATES OF AMERICA, Appellee, v. JASON WAYNE PLEAU, Defendant, Appellant.
--- F.3d ----, 2011 WL 4865159 (C.A.1)

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Slip Copy, 2011 WL 2605301 (D.R.I.)
(Cite as: 2011 WL 2605301 (D.R.I.))

Only the Westlaw citation is currently available.

United States District Court,
D. Rhode Island.
UNITED STATES of America
v.
Jason W. PLEAU, Defendant.

Cr. No. 10–184–1 S.
June 30, 2011.

Adi Goldstein, U.S. Attorney's Office, Providence, RI, for Plaintiff.

Robert B. Mann, Mann & Mitchell, Providence, RI, for Defendant.

OPINION and ORDER

WILLIAM E. SMITH, District Judge.

***1** The United States has petitioned the Court for a writ of habeas corpus *ad prosequendum* for the person of Defendant Jason W. Pleau, and Defendant Pleau has filed a motion for miscellaneous relief, asking the Court not to issue the writ.

I. Background

The charges against Pleau arise from the September 20, 2010 murder of David Main outside of a bank in Woonsocket, Rhode Island. Pleau is currently incarcerated at the Rhode Island Adult Correctional Institutions (ACI), where he is serving state sentences for a parole violation and the violation of a suspended sentence.

On November 18, 2010, the United States filed a criminal complaint against Pleau in this Court, and that same day, a magistrate judge issued a warrant for his arrest. Shortly thereafter, the United States Marshal Service lodged a detainer against Pleau with the ACI. On December 14, 2010, a federal grand jury indicted Pleau for conspiracy to commit robbery affecting commerce, in violation of 18 U.S.C. § 1951(a) (the Hobbs Act); robbery affecting commerce, in violation of 18 U.S.C. § 1951(a); and possessing, using, carrying, and discharging a firearm in relation to a crime of violence with death resulting, in violation of 18 U.S.C. §§ 924(c)(1)(A) & (j)(1). On May 10, 2010, the Court issued a second warrant for Pleau's arrest; this warrant was returned unexecuted two weeks later.

On May 25, 2010, at the request of the United States, the Court entered an order transmitting the United States's request for temporary custody of Pleau under the Interstate Agreement on Detainers Act (IADA or Agreement). In essence, the United States requested temporary custody of Pleau so that he could stand trial in federal court on the charges alleged in the Indictment.

Some background on the IADA is necessary to appreciate the events which followed. Congress enacted the IADA in 1970, joining the United States and the District of Columbia with the 46 enacting states under the Agreement, in order to "encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." 18 U.S.C.App. 2 § 2, art. I; *see also United States v.* ***Mauro***, 436 U.S. 340, 343 (1978).

Article IV of the Agreement provides that a prosecutor is entitled to have a prisoner made available in accordance with Article V of the Agreement, upon the prosecutor's "written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated." The United States is considered a "State" under the Agreement. 18 U.S.C.App. 2 § 2, art. II(a); *see also* ***Mauro***, 436 U.S. at 354 ("[T]he United States is a party to the Agreement as both a sending and a receiving State."). Under the Agreement, a "Sending State" is defined as "a State in which a prisoner is incarcerated at the time ... that a request for custody or availability is initiated [under the Agreement]," and a "Receiving State" is a

"State in which trial is to be had on an indictment, information, or complaint pursuant to [the Agreement]." 18 U.S.C.App. 2 § 2, art. II(b), (c). Article IV(a) further provides that,

> ***2** there shall be a period of thirty days after receipt by the appropriate authorities 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.
>
> *Id.*

On June 23, 2011, the Governor of Rhode Island, Lincoln D. Chafee, sent a letter to the United States denying its request for Pleau's temporary custody under the IADA. (*See* Ex. A to Def.'s Mot., Letter from Lincoln D. Chafee to Peter Neronha, U.S. Attorney, June 23, 2011.) FN1 Four days later, on June 27, 2011, the United States and Pleau filed the petition and motion, respectively, now before the Court.

> FN1. According to news accounts, the Governor's decision to deny the request for temporary custody was a statement against capital punishment, which the United States may seek in this case. *See* Katie Mulvaney, *Will federal death penalty come into play in case of Woonsocket killing?*, Providence Journal, June 25, 2011, *available at* http://www.projo.com/news/content/PLEAU_FOLLOW_06–25–11_JSOR13F_v15.43142.html (last accessed June 29, 2011).

II. Discussion

In its petition for a writ of habeas corpus *ad prosequendum*, the United States requests Pleau's presence for his arraignment in this Court and the consequent prosecution under the Indictment. The United States contends that the Governor's dishonoring of its request under the IADA does not affect the issuance of the writ and that Pleau does not have standing to contest the Court's issuance of a writ of habeas corpus ad *prosequendum.*

A. Standing

Under 28 U.S.C. § 2241(c)(5), a federal court may issue a writ of habeas corpus *ad prosequendum* to secure temporary custody of a state prisoner for the prisoner's federal prosecution. *Flick v. Blevins*, 887 F.2d 778, 781 (7th Cir.1989). FN2 "Upon receipt of such a writ, state authorities deliver the prisoner in accordance with its terms and in compliance with § 2241." *United States v. **Kenaan***, 557 F.2d 912, 916 (1st Cir.1977).

> FN2. For a discussion of the distinction between a writ of habeas corpus *ad prosequendum* and a detainer under the IADA, *see United States v. **Mauro***, 436 U.S. 340, 358–59 (1978).

Numerous federal courts have held that it is axiomatic that "a state prisoner is *without standing* to contest a federal court's issuance of a writ of habeas corpus *ad prosequendum.*" *Derengowski v. United States Marshal*, 377 F.2d 223, 223 (8th Cir.1967) (emphasis in original); *see also Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922); *United States v. Harden*, 45 Fed. Appx. 237, 239 (4th Cir.2002); *United States v. Horton*, No. 95–5880, 1997 WL 76063, at *3 (4th Cir. Feb. 24, 1997) (mem.).

In an attempt to refute this well-established proposition, Pleau points to the Supreme Court's recent decision in *Bond v. United States*, No. 09–1227, 2011 WL 2369334 (U.S. June 16, 2011). In *Bond*, the Supreme Court held that a defendant has standing to bring a constitutional challenge on federalism grounds against a statute under which he was indicted. *Id.* at *3. Pleau, however, challenges the issuance of the writ; he does not challenge the statute authorizing a federal court to issue a writ of habeas corpus *ad prosequendum*, nor any statute under which he has been indicted. Under these circumstances, *Bond* is inapposite, and Pleau clearly lacks standing to challenge this Court's issuance of the writ. *See Derengowski*, 377 F.2d at 223.

B. The Writ of Habeas Corpus *Ad Prosequendum*

***3** It appears that this is the first time a governor has dishonored a request by the United States under the IADA for temporary custody of a state prisoner. For this reason, although Pleau does not have standing to challenge the Court's issuance of the writ, both the federalism principles implicated by these novel circumstances and the practical consequences arising from them warrant some further discussion.

The Supreme Court has made plain that once a detainer is lodged against a state prisoner, the subsequent issuance of a writ of habeas corpus *ad prosequendum* does not relieve the United States of its duty to provide the prisoner with the procedural safeguards set forth in the IADA.[FN3] ***Mauro***, 436 U.S. at 362; *see also Bloomgarden v. Bureau of Prisons*, No. 09–56670, 2011 WL 1301541, at *2 (9th Cir. Apr. 6, 2011) ("[I]t must be conceded that: ... a detainer, once filed, brings the Act into play whereas a writ of habeas corpus *ad prosequendum*, standing alone, would not." (quoting *United States v. Schrum*, 504 F.Supp. 23, 25 (D.Kan.1980))). In short, the issuance of an *ad prosequendum* writ does not nullify the invocation of the IADA and its concomitant procedural protections.[FN4]

FN3. Pleau argues that *United States v. Scheer*, 729 F.2d 164, 170 (2d Cir.1984), stands for the proposition that the issuance of a writ of habeas corpus *ad prosequendum* cannot override the 30–day waiting period provided for in the IADA, where the United States has previously invoked the IADA. Here, however, because the United States petitions the Court for a writ after the 30–day waiting period has elapsed, the Court need not decide the issue.

FN4. Indeed, the United States concedes in its petition that "the speedy trial provisions of Article IV(c) of the [IADA] and the anti-shuttling provisions of Article IV(e) of the [IADA] will apply to [Pleau]." (U.S. Pet. for Writ 3.)

But while the invocation of the IADA serves to extend procedural protections to a prisoner transferred from state to federal custody, it does not turn well-grounded and immutable principles of federalism and federal supremacy on their head. That is, the proviso in Article IV allowing a governor 30 days to refuse a request for temporary custody under the IADA does not, and could not, confer upon a governor the authority to dishonor a federal court's writ of habeas corpus *ad prosequendum*.

The Supremacy Clause of the federal Constitution states that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. The federal statute authorizing a federal court to issue an *ad prosequendum* writ grants federal habeas jurisdiction when "[i]t is necessary to bring [a prisoner] into [federal] court to testify or for trial," 28 U.S.C. § 2241(c)(5). This grant of authority can be traced back to Chief Justice Marshall's explication of the writs available to federal courts in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 98 (1807), in which the Supreme Court recognized the power of a federal court to issue a writ of habeas corpus *ad prosequendum* "when it is necessary to remove a prisoner, in order to prosecute" him.

Article IV's proviso was intended "to do no more than preserve previously existing rights of the sending States, not to expand them. If a State has never had authority [under the Supremacy Clause] 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. Not only does the legislative history of the IADA suggest that the Agreement merely preserved a governor's pre-existing authority to dishonor the request for temporary custody by another IADA State, *see id.* at 363 n. 28 (citing H.R.Rep. No. 91–1018, p. 2 (1970); S.Rep. No. 91–1356, p. 2 (1970)), but also there can be no question that a State's dishonoring of a federal writ violates the Su-

premacy Clause. *See* ***Kenaan***, 557 F.2d at 916 n. 8 (noting that no state has refused to honor a writ under § 2241(c)(a), but that "[in] the unlikely event of such a confrontation, we are confident that the writ would be held [enforceable]"). The Court therefore concludes that where the IADA has been invoked and a detainer lodged against a state prisoner, Article IV may afford the governor of the sending State the right to dishonor the request to transfer (as occurred here) but, in all events does not empower him, or his agents, to disobey a federal court's writ of habeas corpus *ad prosequendum* as to that prisoner.

III. Conclusion

***4** Pursuant to 28 U.S.C. § 2241(c)(5), it is hereby ordered that the United States's petition for writ of habeas corpus ad *prosequendum* for the person of Jason W. Pleau be granted and that the Clerk of the Court issue a writ of habeas corpus ad *prosequendum* in accordance with the United States's petition; Defendant's motion for miscellaneous relief is denied.

IT IS SO ORDERED.

D.R.I.,2011.
U.S. v. Pleau
Slip Copy, 2011 WL 2605301 (D.R.I.)

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United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
➡ Appendix 2. Interstate Agreement on Detainers (Refs & Annos)

➡ § 1. Short title

This Act may be cited as the "Interstate Agreement on Detainers Act".

➡ § 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"**(a)** 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"**(b)** 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"**(c)** 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article III

"**(a)** Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"**(b)** The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"**(c)** The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"**(d)** Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"**(e)** Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or in-

cluded therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"**(f)** Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"Article IV

"**(a)** The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities 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.

"**(b)** Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"**(c)** In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"**(d)** Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"**(e)** If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"Article V

"**(a)** In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"**(b)** The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"**(1)** Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"**(2)** A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"**(c)** If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"**(d)** The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"**(e)** At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"**(f)** During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"**(g)** For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"**(h)** From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"Article VI

"**(a)** In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"**(b)** No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"Article VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"Article VIII

"This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same.

However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"Article IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia.

§ 4. Definition of term "appropriate court"

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

§ 6. Regulations, forms, and instructions

For the United States, the Attorney General, and for the District of Columbia, the Mayor of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

§ 7. Reservation of right to alter, amend, or repeal

The right to alter, amend, or repeal this Act is expressly reserved.

§ 8. Effective date

This Act shall take effect on the ninetieth day after the date of its enactment.

§ 9. Special provisions when United States is a receiving State

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State--

(1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice; and

(2) it shall not be a violation of the agreement on detainers if prior to trial the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing.

END OF DOCUMENT