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 RHODE ISLAND,
Intervenor

IN RE: JASON WAYNE PLEAU,
Petitioner.

ON PETITION FOR A WRIT OF PROHIBITION

AMICUS BRIEF OF THE STEPHEN HOPKINS CENTER FOR CIVIL LIBERTIES IN SUPPORT OF INTERVENOR*

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*This brief supports reversal of district court and affirmance of circuit panel, on alternative grounds

CORPORATE DISCLOSURE

Pursuant to rule 29 (c) (1) of the United States Court of Appeals 1st Circuit Rulebook, the Stephen Hopkins Center for Civil Rights reports that is incorporated as a non-profit in the State of Rhode Island and is not a stock company.

STATEMENT OF AUTHORSHIP

Pursuant to rule 29 (c) (5) of the United States Court of Appeals 1st Circuit Rulebook, the Stephen Hopkins Center for Civil Rights does state that no party's counsel authored this brief in whole or part, that no party or party's counsel, or anyone other than Amicus Curiae, its members and counsel contributed money intended to fund preparation or submission of this brief.

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STATEMENT OF INTEREST

The Stephen Hopkins Center for Civil Rights was formed to facilitate *pro bono* litigation in defense of economic and other liberties crucial to the American tradition of individual autonomy, one in which opportunity is grasped and responsibility shouldered by free individuals largely outside the realm of government dictate. This would not appear to be a case for exploring constitutional limitations on government, as the allegations here fall squarely within a duty for [state] government to punish. The very motivation for a free people to cooperate in government is to enforce their consensus against the violent coercion at the root of this case. Prosecution for robbery and murder are "quintessential" police power exercises of [state] government, see, *e.g., U.S. v. Perotta*, 313 F.3d 33, 37 (2d Cir. 2002) and *U.S. v. Drury*, 344 F.3d 189, 1101 (11th Cir. 2003) (vacated and remanded). But, as these cites suggest, the bounds of federalism are here strained where the locus of this power has been shifted to the national government.

This hazard to the principal constitutional structure designed to limit government's expansionary tendency moves us to seek leave to appear as guardians of the dual security so well articulated by Madison in THE FEDERALIST NO. 51:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

We come to this court without interest in the substantive outcome and concerned that briefing to date has done a disservice to federalism and ignored the history and irony of the so-called governor's "right to refuse", an artifact of federalism misunderstood. We are here, then, as exponents and expounders of federalism.

STATEMENT OF CASE

Principal reference may be had to the case under review, *U.S. v. Jason W. Pleau*, No. CR. 10-184-1S Slip op. (D.R.I. June 30, 2011) ("District Decision"). Defendant–Appellant stands accused of the murder of David Main in Woonsocket on Sep. 20, 2010 during a robbery, *Id* at 1. The U.S. Attorney has asserted jurisdiction over the case and sought first via request under the Interstate Agreement on Detainers ("IAD"), 18 USC App. § 2, District Decision at 2, and then by writ of habeus corpus *ad prosequendum*, *Id* at 3, to have defendant transferred to federal custody for trial. Pleau moved for this Court to stay execution of the writ and applied separately for a writ of prohibition. These matters were consolidated and a panel of this Court approved an advisory writ in consequence of Governor Chafee refusing the transfer under the IAD, *In re: Jason Wayne Pleau*, Nos. 11-1775, 11-1782 Slip op. At 28-29 (1st Cir. Oct. 13, 2011) (vacated *en banc*).

STATEMENT OF ISSUES

In the kind of eleventh hour conversion that many charged with federal crimes have had, Pleau appears to have found Madison, arguing that the Governor's pre-

rogatives should prevail as a matter of federalism. The accused has spoken of federalism in this case, (Pleau Br. 11-1782, July 14, 2011, ECF No. 00116232908 at 25), but his arguments do not sound in federalism. We agree that its dictates control a case pitting the federal government against a state government, but disagree that the mechanism of the governor's "right to refuse", Panel Decision at 29, is the "quintessential manifestation of federalism", Pleau Br. At 25, for historical reasons that have escaped the attention of the parties and the court to date.

The Governor, by contrast, never mentions federalism although he might be said to allude to it. A lack of explicit concern for the principles of federalism is unsurprising where they are asserted as a pretext to secure an outcome rather than as a principle to be applied *volo, nolo*.

Amicus suggests the question of jurisdictional reach under 18 U.S.C. § 1951 (the "Hobbs Act") is central to this case. The Governor's policy arguments are that state law should control, albeit he would vindicate those arguments under the Compact Clause.[1] To the extent that the Governor has not squarely implicated federalism and Pleau's standing to raise it is undecided, *see*, District Decision at 5, we argue that the federal government has raised the issue by invoking the Supremacy Clause[2], U.S. Br. 11-1782, July 13, 2011, ECF No. 00116232503 at 13, and consequently the District Decision centers on "principles of federalism and federal su-

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1 U.S. Const. Art. I §10, cl. 3

2 U.S. Const. Art. VI, cl. 2

premacy," *Id* at 7. This law of the case coupled with routine to *sua sponte* consideration of federalism's limitations on jurisdiction under the Hobbs Act, *see*, *U.S. v. Vazquez-Botet*, 532 F. 3d 37 (1st Cir. 2008), suggest the issue is now ripe.

SUMMARY OF ARGUMENT

In sum, the Governor mistakes what is truly national—deciding the punishment for a federal crime, with what is truly local—the general police power to prosecute murder and robbery. This omission is compounded by the Governor's appeal to a hubristic redux of the states rights at the core of *ante bellum* constitutional jurisprudence[3] since recognized by the Supreme Court as one of the errors of that time[4]. That history is not simply a backdrop, for those decisions are of direct relevance to the present matter.

The Governor may conceive of himself as exercising a traditional prudential safety valve—acting as a guardian against penal regimes in other jurisdictions foresworn by the people of Rhode Island. But the American system is one of resorting to the Constitution for these protections, while his tactics are the very denial of a constitutional duty.[5] The states have necessarily set aside their antecedent

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3 *See Com. Of Kentucky v. Dennison*, 65 U.S. 66 (1860)

4 *See Puerto Rico v. Branstad*, 483 US 219 (1987)

5 U.S. Const. Art. IV, § 2, cl. 2:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

nation-like sovereignty while retaining the local police powers. In deliberate balance, the federal government been called to observe the enumerated bounds of this arrangement. S*ee*, generally, *U.S. v Lopez*, 514 U.S. 549 (1995).

We argue that *Puerto Rico v. Branstad*, 483 US 219 (1987), moots the question of the IAD's effect on federal supremacy, but that the federalism concerns expressed offer this Court sitting *en banc* the unique opportunity and duty to more fully consider the application of *Lopez* to the Hobbs Act—an exercise that, to date, has been the subject of much conclusory agreement among the circuits with a thread of significant dissent running literally down the middle of the Fifth Circuit.[6]

This is, admittedly, an uphill argument in this circuit that has numerous times accepted a *de minimus* pretext for federal jurisdiction under the Hobbs Act since *Lopez* was decided.[7] While *Dennison*, first announcing what is now adverted to as

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[6] *See*, *U.S. v McFarland*, 311 F.3d 376 (5th Cir. 2002) (Garland, J., dissenting); *U.S. v Hickman*, 179 F.3d 230, 231 (5th Cir. 1999) (Higginbotham, J., dissenting); and *id* at 243 (DeMoss, J., dissenting); *United States v. Hebert*, 131 F.3d 514, 525 (5th Cir.1997) (DeMoss, J., dissenting in part); *United States v. Miles*, 122 F.3d 235, 241 (5th Cir.1997) (DeMoss, J., specially concurring)

[7] *U.S. v. Catalan-Roman*, 585 F. 3d 453, 462 (1st Cir. 2009); *U.S. v. Cabrera-Rivera*, 583 F. 3d 26, 32 (1st Cir. 2009); *U.S. v. Rivera-Rivera*, 555 F. 3d 277, 286-289 (1st Cir. 2009); *U.S. v. Vazquez-Bo*tet, 532 F. 3d 37, 68 (1st Cir 2008); *U.S. v. DeCologero*, 530 F. 3d 36, 68 (1st Cir. 2008); *U.S. v. Garcia-Ortiz*, 528 F. 3d 74, 84 (1st Cir. 2008); *U.S. v. Turner*, 501 F. 3d 59, 69-70 (1st Cir. 2007); *U.S. v. Nascimento*, 491 F. 3d 25, 53 (1st Cir. 2007); *U.S. v. Ossai*, 485 F. 3d 25,30-31(1st Cir. 2007)(substitutes "slight or untraceable"); *U.S. v. Cruz-Arroyo*, 461 F. 3d 69, 75 (1st Cir. 2006); *U.S. v. Jimenez-Torres*, 435 F. 3d 3, 7-8 (1st Cir. 2006); *U.S. v. Rodriguez-Casiano*, 425 F. 3d 12, 14 (1st Cir. 2005); *U.S. v. Vega Molina*, 407 F. 3d 511, 526-527 (1st Cir. 2005);

the governor's "right to refuse" was the settled law of the land for some 125 years only to be cast aside as a relic of its time, ours is hardly an invitation to revisit such an *ancien regime*. Rather the tradition of comity among circuits and restraint in the form of *stare decisis* have prevented later panels in this[8] and other circuits[9] from revisiting the relatively recent first impressions of Hobbs Act jurisdiction following *Lopez*.

All roads to that question, in this circuit, lead through *U.S. v. Capozzi*, 347 F. 3d 327 (1st Cir. 2003). We do not dispute the *Capozzi* panel's efforts to distinguish the Hobbs Act from the Gun Free School Zones Act, 18 U. S. C. § 922(q)(1)(A) (1988 ed., Supp. V) ("GFSZA"). We think, however, that the line was traced too directly, in a review for plain error, *id* at 336, from the existence of a jurisdictional element, lacking in the GFSZA, to jurisdiction. This elided the *Lopez* test that, to be reached, a *de minimus* intrastate activity need be "an essential part of a larger

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U.S. v. Brennick, 405 F. 3d 96, 100 (1st Cir. 2005); *U.S. v. Rivera Rangel*, 396 F. 3d 476, 482-483 (1st Cir. 2005); *U.S. v. Cianci*, 378 F. 3d 71, 98-99 (1st Cir. 2004); *U.S. v. McCormack*, 371 F. 3d 22, 27-28 (1st Cir. 2004); *U.S. v. Capozzi*, 347 F. 3d 327 (1st Cir. 2003).

[8] *U.S. v. Jimenez-Torres*, 435 F. 3d 3, 7-8 (1st Cir. 2006) (Torruella, J., concurring) "the majority and I are required to affirm Jiménez's conviction by reason of binding circuit precedent, I believe that this precedent is based on an interpretation of the Hobbs Act, 18 U.S.C. § 1951(a), that extends Congress' power to regulate interstate commerce beyond what is authorized by the Constitution."

[9] *Miles*, 122 F.3d at 241(DeMoss, J., specially concurring) (our decision is controlled by the prior decision of this Court … I find myself in such fundamental disagreement with the conclusions … as to the effect of [*Lopez*] on Hobbs Act prosecutions that I must register these contrary viewpoints." (citations omitted).

regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id* at 624.

The GFSZA had a scheme devisable from its statutory language. Congress had a fairly precise idea of what it wanted to regulate, but given the lack of economic character of the activity, *id* at 567, and the lack of jurisdictional element, *id* at 561, the scheme was still wide of the commerce clause power. In the Hobbs Act context, there is a jurisdictional element and economic component, but no regulatory scheme to speak of, certainly not an **unmistakably clear** one.

Unsurprisingly, in *Stirone v. U.S.*, 361 US 212 (1960) and *U.S. v. Green,* 350 U.S. 415 (1956), the Supreme Court accepted the act's constitutionality with regard to extortionary plots whose pecuniary ambit reverberates in interstate commerce. But pay to play extortion was clearly on the mind of Congress in both the earlier Anti-Racketeering Act of 1934, Pub.L. 376, 48 Stat. 979-80, and the Hobbs Act which amended it. *Green* left no doubt that the Court would consider what Congress had in mind in deciding the commerce clause jurisdiction question:

> The city truckers in the *Local 807* case similarly were trying by force to get jobs and pay from the out-of-state truckers by threats and violence. The Hobbs Act was meant to stop just such conduct.

Id at 460.

The cases were unmistakably within the ambit Congress had set out to capture and neither of them extended to any consideration of *de minimus* activities

outside the scope of the Congress's regulatory scheme.

In sum, we think this court should stay execution of the writ, not because of the IAD, but because affording federal jurisdiction in such a circumstance of *de minimus* effect on commerce with no **unmistakably clear** direction would impermissibly disturb the constitutional structure. While the normative approach of post conviction review[10] does not hazard the defendant, we argue such a delay itself presents hazards to federalism.

ARGUMENT

Which Writ?

U.S. v. Mauro, 436 U.S. 340 (1978) clearly held that Congress had subjected federal prosecutions to deadlines specified under the IAD Art. IV, (c) subsequent to the filing of a detainer, and regardless of the form of the "request." But this proposition is not logically coterminous with the notion that filing a detainer constitutes a waiver of federal supremacy, *i.e.*, an **unmistakably clear** statutory design that Congress meant to waive federal supremacy and the statutory writ, 18 U.S.C. 2241 (c) in favor of the governor's "right to refuse".[11]

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[10] See, *U.S. v. Alfonso*, 143 F. 3d 772, 776 (2nd Cir. 1998)

[11] Against the waiver, it may be contended that this governor's "right to refuse" was an *ex ante* artifact and not part of the penal reform that inspired the design of the IAD. *see Mauro,* 436 US at 350 (enumerating the "guiding principles . . . underpinning" the IAD). Thus, even defining all parties as states fails to resolve whether Congress unmistakably intended to subject federal supremacy to governor's prerogatives under a rubric amounting to possession is nine-tenths of the law.

If one were to grant the possibility that the Congress had statutorily subjugated the federal *ad prosequendum* writ to the governor's "right to refuse", one need still ask: whither the state writ? At the time of *Mauro*, such a construction would have been laughable, as no writ would issue for extradition from one state to another in consequence of *Kentucky v. Dennison*, 65 US 66 (1860).[12] Indeed, it is in

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[12] The dry recitation of these precedents is most suited to the continuity of the present analysis, but their historic context cannot be ignored. *Dennison*, authored for a unanimous court by Chief Justice Taney is arguably a bookend to *Dred Scott v. Sandford*, 60 U.S. 393 (1956). Despite the derision visited on Taney's earlier decision, he continued in *Dennison* to undertake compromises of the law in efforts to mollify the discord that threatened the *ante bellum* union. *Dennison* represents an accommodation that substantively benefited the free state perspective while attempting to simultaneously uphold the constitutional design, a stretch that Thurgood Marshall would see as a bridge too far in *Branstad*.

In *Dennison*, the Taney Court was urged by Kentucky to simply enforce the mandate of U.S. Const. Art. IV, §1 cl. 2, that would require the extradition from Ohio of a free black man who stood accused of helping a slave escape. Ohio, conversely, sounded a call to arms for states rights arguing "in respect to all this mass of undelegated and unprohibited power, the States stand to each other and to the General Government as absolutely foreign nations." *Dennison* 65 U.S. at 87.

Taney saw the interpretative convenience urged by Ohio:

> [T]he laws of Kentucky do denounce this act as a 'crime,' and the question is thus presented whether, under the Federal Constitution, one State is under an obligation to surrender its citizens or residents to any other State, on the charge that they have committed an offence not known to the laws of the former, nor affecting the public safety, nor regarded as *malum in se* by the general judgment and conscience of civilized nations.

Id at 68, 69 as foreclosed. Seeing the constitutional design as deliberate, *id* at 100, and Ohio's construction would "render the [extradition] clause useless", *id* at 102, Taney wrote that the Constitution presupposed a governor's "obligation to deliver", *id* at 103, but held, in what might have later been recognized as a Pickett's Charge for states rights, that the duty was mandatory on-

this context that the *ex ante* governor's "right to refuse" came to exist; and, thus, when this aspect of *Dennison* was overruled in *Puerto Rico v. Branstad*, 483 U.S. 219 (1987) the "right" ceased to exist—excepting perhaps in statute.[13] No reading of *Branstad* would suggest that it directly revokes the IAD's 30 day waiting period during which a governor may refuse an extradition request, IAD Art. IV (a), but stopping there is short of assessing the actual impact of *Branstad* in this case.

Branstad and progeny thus provided a writ of mandamus to states seeking to compel extradition. *See*, *e.g.*, *Alabama v. Engler*, 85 F.3d 1205 (6th Cir. 1996).

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ly in the moral sense because "the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty." I*d* at 107.

[13] Thurgood Marshall wrote for the unanimous Court in *Branstad*:

> *Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development.

Id, 483 U.S. at 230. In what must now be deemed a preclusive blow to all but the most pretextual statutory assertion by the Governor, the Court said specifically:

> Respondents contend, however, that an "executive common law" of extradition has developed through the efforts of Governors to employ the discretion accorded them under Dennison, and that this "common law" provides a superior alternative to the "ministerial duty" to extradite provided for by the Constitution. . . . Long continuation of decisional law or administrative practice incompatible with the requirements of the Constitution cannot overcome our responsibility to enforce those requirements. See, e. g., *Brown v. Board of Education*, 347 U.S. 483 (1954); Green v. New Kent County School Board, 391 U.S. 430 (1968). (citation omitted)

Id at 228, 229.

Like federal supremacy, extradition amongst the states is part of the constitutional structure. In the vital remnant of *Dennison* endorsed in *Branstad*, the Court noted:

> [T]his compact engrafted in the Constitution included, and **was intended to include**, every offence made punishable by the law of the State in which it was committed . . . **without any reference** to the character of the crime charged, or **to the policy or laws of the State** to which the fugitive has fled.

Branstad, 483 U.S. at 225 *(citing Dennison,* 65 U.S. at 103).

As a purposeful constitutional prerogative, this was a writ that no state (or the federal government as "state") could have foresworn in any **unmistakably clear** way by the adoption of the IAD, as the writ would not issue at the time the IAD was drafted and adopted. Certainly, if the IAD had been adopted after *Branstad*, it would stand as a clear endorsement of the neo-common law regime of refusal that emerged under *Dennison*. But the IAD was adopted in ignorance of *Branstad*.

With due respect to the panel of this court that saw fit to issue an advisory writ given the apparent necessity to confront an issue of first impression, the narrow focus of briefing to date has denied this Court the fuller context to see that the governor's "right to refuse" is a dead letter. The question of whether the federal writ is here unavailing against the remaining wraith of this statutory relic is moot, as the federal government is entitled to a writ of mandamus compelling the 'extradition' of Pleau to federal custody, as would be any state, the IAD notwithstanding. "[T]he Extradition Clause creates a mandatory duty to deliver up fugitives upon **proper**

demand", *Branstad*, 483 US at 226, and the right to have extradition could not have been bargained away in the very absence of its recognition.

Propriety and Posit

Amicus suggests that a measure of the power that Governor Chafee proposed to wield remains. The constitutional mechanisms of federalism are a ground for any governor, even in an otherwise ministerial role, to question the **propriety** of a demand from the federal government to a state. That distinguishes this case from the plethora of others in which convicted offenders are drawn to the light of federalism. We cannot find in the Hobbs Act jurisprudence of this Circuit or any other, a case in which a state has been a party to a proceeding that actually adjudicates invasion of its jurisdiction and in the pivotal case in this circuit, the issue was not raised in the trial court and was reviewed only for clear error. *See Capozzi*, 347 F 3d. at 336. Certainly the review was not cursory, but it almost seems axiomatic that clear error could not likely be found in so close a question, leaving this as the butterfly's wing that has spawned a hurricane of precedent.

The comity of *stare decisis* applied in such a circumstance leads to few opportunities for serious first principles consideration of the question. It is not a lack of vigorous advocacy or any judicial disinterest that leads to a rote jurisprudence in this realm, but the very nature of the cases that contribute to the body of precedent.

Not only does the governor's participation in defense of the state's preroga-

tives make this a case in which federalism may be paid its due, but his intervention allows an unusual pause for reflection at this stage in the proceedings. When thus contemplated it can be seen that the consistent posit of these cases as post-conviction relief, *see*, *e.g.*, *U.S. v. Alfonso*, 143 F. 3d 772, 776 (2nd Cir. 1998), is itself a hazard to federalism. While post-conviction review can protect the right of the defendant to challenge the sufficiency of evidence of effect on commerce, the public interest in the present matter is not served by waiting out a federal prosecution as the very harm feared—an implicit indictment of the sufficiency of the state criminal justice system, would be effectively embraced by a federal trial.[14]

Our attempts to focus this circuit on the expansionary character of the federal criminal law have been attracted by this unique posit, but our concerns are by no means original. They are paralleled throughout academic and professional legal literature of groups as philosophically diverse, at least as they are caricatured, as the American Bar Association and the Federalist Society. See, e.g., James Strazella Et

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[14] Susan A. Ehrlich, a former U.S. Assistant Attorney and Arizona Appeals Court Judge who served on the American Bar Association task force on the Federalization of Criminal Law explains these risks:

> A political culture that comes to regard the federal government as its guardian relegates the local and state governments to secondary status. The premise—articulated or not—is that these lesser governments are not capable of handling important matters.

Susan A. Ehrlich, *The Increasing Federalization of Criminal Law*, 32 Ariz. St. LJ 825, 837 (2000).

Al., Task Force On The Federalization Of Criminal Law, Am. Bar Ass'n Criminal Justice Section, The Federalization Of Criminal Law (1998); John S. Baker, Jr., *Measuring the Explosive Growth of Federal Criminal Law*, Engage: The J. of the Fed. Soc. Practice Groups, Vol. 5, No. 2, 23 (Oct. 1, 2004).

The Hobbs Act after *Lopez*

Amicus respectfully submits, in admitted contravention of extant circuit law, that the Supreme Court's holding in *US v Lopez*, 514 U.S. 549 (1995) emphasizes the need for recalibration of the constitutional reach of the Hobbs Act:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do. (citations omitted)

Lopez, 514 US at 568-569.

As an *en banc* court with the greatest power to review and revise circuit law, we urge this court to recognize the paradox of simultaneously reading "affecting commerce" to award broad jurisdiction and narrow design.

Congress likely meant to capture, under the Hobbs Act, even minimal activities having a substantial relation to those that served as inspiration for its passage.

S*ee* Michael McGrail, *The Hobbs Act After Lopez*, 41 B.C.L. Rev. 949, 956 (2000) (detailing adoption of the Anti-Racketeering Act of 1934 pursuant to a Senate Committee on Interstate Commerce Report that found "rackets involving the "hi-jacking" of trucks used to transport merchandise in interstate commerce and other acts perpetuated in the field of transportation were the most common" (citing S. Rep. No. 75–1189, at 3 (1935))) and *U.S. v Miles*, 122 F. 3d 235, 244 n.1 (1997) (relating debates during adoption of the Hobbs Act that amended the Anti-Racketeering Act of 1934 and bestowed its present popular name: "Hon. Joe Eastman, then head of the Office of Defense Transportation, told me that his examiners reported 1,000 trucks a night being held up and robbed in various cities of this Union" (quoting 91 CONG. REC. 11,911 (1945) (statement of Rep. Hobbs))).

Thus, for example, in *U.S. v. Green*, 350 US at 460, which squarely involved the extortion of jobs and money from interstate truckers, there can be little hazard that inference was a tool for awarding commerce clause jurisdiction, regardless of whether acts individually might have had a *de minimus* effect on commerce. *Green* does not speak to the quantum of effect on commerce as awarding jurisdiction, but rather the clarity with which the predicate acts are within the power of Congress to reach **and** that it "meant" to do so. That inquiry would come out quite differently in the case at bar; and that is the analysis we think *Lopez* recommends.

The use of inference cuts both ways and we are by no means suggesting that

Congress "intend[ed] to make "racketeering" an element of a Hobbs Act violation", a notion rejected by the Supreme Court in *U.S. v Culbert*, 435 U.S. 371, 373 (1978). Rather, application of the Hobbs Act to intrastate acts having *de minimus* effect on interstate commerce draws into question **not what** are the elements of the crime Congress intended, **but what** is the constitutional reach with which federal prosecutors may invade traditionally local jurisdiction to prosecute the elements Congress did spell out?

Lopez is comprehensive in offering a precept that may properly bound the Hobbs Act. For *de minimus* intrastate activity to be reached, it must be an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id* at 561. This is a well recognized limiting principle that animates decisions spanning commerce clause jurisprudence from *Wickard v. Filburn,* 317 U.S. 111, 128-29 (1942) ("trivial by itself . . . taken together with that of many others . . . wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect") to *Gonzales v. Raich* 545 U.S. 1, 22 (2005) ("That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme").

It is uncontroversial that Congress can regulate the interstate market in controlled substances. And while the policy may be debated, it is equally uncontrover-

sial that they did so with a careful and discernible scheme, *see, e.g.*, the Comprehensive Drug Abuse Prevention and Control Act, 23 USC § 801, which tells at length the purposes and conditions giving rise to the enactment and the commerce sought to be regulated. In *Wickard* the court itself described the design with footnotes to the statutory text as follows:

> The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances. (footnotes omitted)

Id. at 115 [15]

Our suggestion is not, in fact, a comparison of these organized regulatory schemes to that at work under the Hobbs Act, but an insistence that there is virtually no comparison of the straightforward police power approach of the Hobbs Act to

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[15] We would argue that the *Wickard* and *Raich* schemes invade individual prerogative in ways that make them poor policy, yet acknowledge that Congress had a scheme. Further, we concede that some aggregation of insubstantial evasions of these schemes—which we continue to regard as trivial, and attempts to capture them an overreach on the part of the federal government—do nonetheless have the possibility of impacting the overall scheme. As such, in accord with presently settled holdings of the Supreme Court, reach to these *de minimus* activities is within the Congress's commerce clause power. We think, by contrast, that the broad reading of the Hobbs Act is without any discernible scheme that could support its extension to intrastate activities lacking a substantial effect on commerce.

the more intricate regulatory enactments at work in *Raich* and *Wickard*.

The plain language of the Hobbs Act bars any robbery affecting commerce, and it is clear that uncontemplated circumstances of robbery beyond those inspiring Congress's action would be implicated if, taken alone, they had a substantial effect on interstate commerce. Our quarrel with extant precedent is that it either refuses to take such robberies alone, *see* generally *Hickman*, 179 F.3d at 272 (Higginbotham, J., dissenting) (describing at length why most aggregation is inappropriate in the Hobbs Act context) or, when it does take them in isolation, it considers **not** whether the effect was substantial, **but** simply whether the robbery had the most attenuated *de minimus* effect on commerce.

Lack of Interference With Federal Scheme Favors State Prosecution

Culbert, 435 US at 380, indicates the Supreme Court's understanding that, despite concerns for states rights, "Congress apparently believed . . . that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce." The same debates and reports cited, though, tell at length of Congress's sense that "there were meaningful limits on the commerce power", *see*, *e.g.* *McFarland*, 311 F 3d. at 384 (Garwood, J., dissenting). In reconciling this history with *Lopez*, it seems reasonable at minimum to find that the act's scheme only intended to invade state jurisdiction where it proved ineffectual.

Even to the extent that the literal text of the Hobbs Act may be read as an

unmistakably clear invasion of state jurisdiction, the extent of such invasion would still be constitutionally sensitive. It is quite easy to see that, unlike *Wickard* and *Raich*, acts such as those alleged of the Defendant-Appellant, representing serious state crimes with *de minimus* effects on commerce, could be punished effectively at the state level with no harm to the federal scheme.[16] It is axiomatic that state jurisdiction only ceases to exist where incompatible with the exertion of federal jurisdiction . But it seems equally true, as a matter of federalism, that the default in these *de minimus* cases is set the wrong way. We offer a formulation for this inquiry in which the federal government, unless it alleges and intends to prove a substantial effect on commerce of the predicate acts should make a pretrial showing why the alleged acts could not be prosecuted effectively by the state.

CONCLUSION

In light of this full panoply of factors, *i.e.*, the invasion by the federal statute of prerogatives that the Constitution delegates primarily to the states, the lack of unmistakably clear legislative ambit to disturb those in *de minimus* intrastate instances, and the availability of effective prosecution at the state level, it simply de-

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[16] Respect for the state as the possessor of the general police power, to the extent it may impinge on Hobbs Act jurisdiction, cannot logically be said to frustrate the act's aims unless such robberies or extortion could not be effectively punished at the state level, and *see*, 9 USAM 27.220 cautioning U.S. Attorneys to consider just that question in charging decisions. Unlike the potential debilities for the national prerogatives sought to be advanced in *Raich*, the present circumstances do not place a state regulatory scheme in conflict with a federal regulatory scheme. Both schemes would severely punish the predicate acts.

fies logic to suggest that restoring federalism in this arena by barring or restricting federal prosecution of *de minimus* effects on interstate commerce under the Hobbs Act would upset a careful scheme of regulation.

We urge this court to join the dissenters in the Fifth Circuit and to embrace the formulation offered by *McFarland*, 311 F.3d at 410 (Higginbotham, J., dissenting):

> there is a step that principles of judicial restraint offer this inferior court before it decides if Congress has the authority under the Commerce Clause to make a federal crime of local robberies . . . we ought to refuse to apply the Hobbs Act to this genre of local robberies until Congress clearly states its purpose to do so. Only then should the courts decide the commerce question now being pressed upon us.

Our predilection is clear, thinking the record sufficient to place the present matter under "this genre of local robber[y]" with *de minimus* effects on commerce and to suspend the writ on that basis. But one supposes it is possible that the federal government might allege a substantial effect on interstate commerce and that further evidence on this question might need be adduced. As that great lawyer cousin of philosopher Lao-Tse is reputed to have uttered, the journey of a thousand miles begins with a single remand.

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CERTIFICATE OF SERVICE

I certify that a true copy of this brief was delivered via e-mail from our office to the following parties:

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