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INTERESTS OF *AMICI*[1]

NACC, founded in 1977, is a 501(c)(3) non-profit corporation organized under the laws of Colorado. It is a child advocacy and professional membership association dedicated to enhancing the well being of America's children. It is a multidisciplinary organization with approximately 2,000 members representing all 50 states and the District of Columbia. NACC's membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. Its programs and services include training and technical assistance, the National Children's Law Resource Center, the attorney specialty certification program, the Model Children's Law Office program, policy advocacy, and the *amicus curiae* program.

The appropriate application of the Interstate Compact on the Placement of Children (ICPC) is among the issues that NACC monitors throughout the country. After careful review of the law, NACC opposes the application of the ICPC review

[1] This brief was not authored, in whole or in part, by counsel to a party and no contribution to its preparation or submission was made by any person other than the *amici*.

process on parents as both a legal and a policy matter. Its reasons why are discussed below.

Lawyers For Children ("LFC") is a not-for-profit legal corporation dedicated to protecting the rights of individual children in foster care in New York City and compelling system-wide child welfare reform. Since 1984, LFC has provided free legal and social work services to children in more than 30,000 court proceedings involving foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody and visitation. This year, our attorney-social worker teams will represent children and youth in close to 3,000 judicial proceedings in New York City Family Courts. In addition, LFC publishes guidebooks and other materials for children and legal practitioners, conducts professional training sessions, and works to reform systems affecting vulnerable children through class action impact litigation, legislative advocacy, and policy level collaboration with City and State agencies. LFC's insight into the issues raised in the instant case is borne of more than thirty years of experience representing children in family law matters.

SUMMARY OF ARGUMENT

This case addresses the recurring situation in which a child is removed from one parent in the course of a child protective proceeding, and the other parent, who is not accused of any wrongdoing, seeks custody. The proper course of action in

such a situation is to place the child in the non-respondent parent's physical custody unless that parent's rights have been terminated or diminished, or that parent is alleged to be unfit. That proper course of action is no different when the parent seeking custody lives in another state, like the father in this case who lives in New Jersey. Yet because of a misinterpretation of the Interstate Compact on the Placement of Children (the "Compact" or "ICPC"), the child may be placed instead with strangers in state custody. Stranger foster care is harmful to children—and in a case like this, it is totally unnecessary, inappropriate, and unlawful.

This case presents the important question whether the Compact forbids placement of a child with a parent who lives outside of New York State without the permission of the "receiving" state. Getting such permission from a busy child welfare agency in another state creates delay and uncertainty, and sometimes insurmountable obstacles—preventing a parent from caring for his own child, leaving a child with strangers in foster care or some other placement, and violating fundamental rights of both child and parent.

By its plain terms, the Compact applies only to foster care and adoptive placements—not to placement with a parent. This is consistent with the purpose of the statute, and any agency "regulation" to the contrary has no legal effect.

Application of the Compact to prevent the unification or reunification of a child with his parent also violates the constitutional rights of both the child and

parent. Unlike other "placements," such as in foster homes, group homes, or even with other family members, whose legal rights to the custody of a child only arise out of a court order and agency supervision, natural parents have unique, and inherent, rights to their children, such that they are *presumptively* entitled to custody. Courts that have considered these fundamental constitutional issues have readily concluded that the Compact cannot be applied to keep a child from his natural parent where there is no overriding justification.

Construing the Compact to apply to parents is also fundamentally at odds with New York's overriding interest in serving the best interests of children. The social science evidence is overwhelming that children suffer harm when separated from their parents without overriding justification, and that time spent in foster care is detrimental to children (even if it might be required under certain circumstances). The simple fact that a parent resides in a different state is, alone, not a circumstance that justifies imposing such harm on a child.

While some courts in New York and around the country have applied the Compact to regulate the placement of children with parents, those cases are distinguishable in that they fail to consider the constitutional significance of the parent-child relationship or address distinguishable factual circumstances. Those cases are also outweighed by the developing trend in which courts have examined the text and background of the statute, as well as the constitutional implications,

and concluded that the Compact's onerous procedural hurdles cannot apply to placement of a child with his parent. This Court has not yet ruled on this issue.

This Court should decide this important and recurring question in order to avoid future harm to children and parents stemming from misapplication of the Compact. This issue is particularly important to families within the jurisdiction of the First Department, because in and around New York City it is not uncommon for a non-custodial parent (even one with frequent contact with the child) to live in another state within the tri-state metropolitan area. As a matter of both New York and constitutional law, the ICPC does not and cannot apply to placements of children with their parents.

BACKGROUND

I. The Compact

The Interstate Compact for the Placement of Children—adopted by all fifty states, and codified under New York's Social Services law—regulates the placement of children across state lines "in foster care or as a preliminary to a possible adoption." N.Y. Soc. Serv. L. § 374-a(1), Art. III(a). Drafted in 1960, the Compact was "intended to facilitate interstate adoption, thereby increasing the pool of acceptable homes for children in need of placement." Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 293 (1989). The Compact was meant to serve this

overall goal by addressing "common problems arising from the interstate care and placement of children *in foster care or adoptive homes*." *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991) (emphasis added) (citing The Secretariat to the Association of Administrators of the Interstate Compact on the Placement of Children, *Guide to The Interstate Compact on the Placement of Children* 3 (1990)).

Article III of the Compact provides that, "No sending agency shall send, bring, or cause to be sent or brought into any other party state any child *for placement in foster care or as a preliminary to a possible adoption*, unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state that govern the placement of children therein." § 374-a(1), Article III(a) (emphasis added). Limited to placements in foster care or as a preliminary to adoption, the statute also specifically excludes from its reach the "sending or bringing of a child into a receiving state by his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or . . . guardian." *Id.*, Art. VIII(a).

When such a "placement in foster care or prior to a possible adoption" in another state is proposed, the child "shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed

placement does not appear to be contrary to the interests of the child." *Id.*, Art. III(d).

In practice, this process requires child welfare authorities in the sending state to complete a packet of information, send it to child welfare authorities in the receiving state, and wait for those authorities to make an independent determination as to whether the proposed placement is "contrary to the interests of the child." *Id.* This is a cumbersome bureaucratic process in which significant delays are the rule rather than the exception. A 2014 study of 27 states concluded that "routine" delays in this process leave children languishing in foster care for months. Vivek S. Sankaran, *Foster Kids in Limbo: The Effects of the Interstate Compact on the Placement of Children on the Permanency of Children in Foster Care* 5 (2014).[2] *See also* John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-Of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 59 (2006) (finding that the typical timeframe for both the sending and receiving states to complete an ICPC review of the placement of a child was six months, and in many instances the review took *a year or longer*). "In practice, the typical delay is so long that the requirement to use this process often

[2] Available at https://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/Annie_E_Casey_Report.pdf

eliminates viable alternatives from the court's consideration and thus harms the child rather than helps the child." *In re Crystal A.*, 13 Misc. 3d 235, 238 (Sup. Ct. Clinton Cty. 2006).

Following placement of the child within the receiving state, the sending agency retains "jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state." § 374-a(1), Art. V(a). The sending agency retains the power to secure the return of the child or a transfer to another location and continues to have responsibility for the financial support of the child. *Id.*

II. Divided Case Law On The Application Of The Compact To Placement With Non-Custodial Parent

"[T]here is conflicting authority among the various jurisdictions in the nation as to whether the ICPC applies to reunification of a child with a noncustodial parent." *In re Tumari W.*, 65 A.D.3d 1357, 1360 (2d Dep't 2009) (citing *Bester v. Lake Cty.Office of Family & Children*, 839 N.E.2d 143, 145, n. 2 (Ind. 2005)). In *Tumari*, the Second Department stated that "New York State is squarely among those jurisdictions which apply the ICPC to a noncustodial parent," *id.* (internal citations omitted)—but this is a significant overstatement; the

law in New York is nowhere near settled on this question. Indeed, it has never been addressed by the First Department.

Even the Second Department was divided in *Tumari*, with two of the five judges on the panel dissenting. *Tumari*, 65 A.D. 3d at 1361 (Spolzino, J.P., dissenting). As the dissent observed, the cases relied upon by the majority do not reflect a coherent view that the Compact applies to noncustodial parents: "In each of those cases . . . the party seeking to relocate the child was either not the child's parent or a parent who had, for some reason, been deemed of diminished parental capacity." *Id.* at 1364 (citations omitted).

Rather, the dissent points out, the court has held that "a child who has been removed from his mother's care by reason of neglect must be released to his father, without reaching the issue of the child's best interests, unless there has been a 'threshold showing of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' to justify the State's intrusion into the family domain." *Id.* at 1362 (collecting cases). "The principle . . . is simple and long recognized" that "[t]he mother or father has a right to the care and custody of a child, superior to that of all others, unless he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood." *Id.* (collecting cases). "This principle underlies the [Compact] as well." *Id.*

Recognizing this fundamental principle, and yet uncertain of the constraints of the Compact, family courts have looked to procedural alternatives and work-around solutions to avoid the morass of the Compact hindering—or altogether blocking—custody of a child with an out-of-state parent. These alternatives include granting full custody to the non-offending out-of-state parent and immediately closing the case to terminate jurisdiction, rushing to reunify a child with the in-state parent from whom the child was removed in the first place, or even granting a simple stay of an order remanding a child to foster care placement, in order to allow a child to remain with a parent on an "extended visit", as happened in this case.

These workarounds exist because family courts understand the risks to children when the Compact is applied to parents. But these alternatives present their own dangers: premature termination of family court jurisdiction—even when a child is living, appropriately, with a non-offending parent—can deprive the child and family of valuable supervision and access to services. Similarly, rushing to reunify a child with an in-state parent who has not adequately rehabilitated, in order to avoid stranger foster care, can be contrary to a child's best interests, particularly when the other parent is willing and able to take custody.

This case calls upon the Court to bring clarity to this important aspect of family law, and determine that the Compact does not, and cannot, apply to the

placement of a child with his own parent. To hold otherwise would impose significant and unwarranted harm on children who have done nothing wrong–except having been born to a parent who lives across state lines.

ARGUMENT

I. The Statute Is Unambiguous, And Its Plain Terms Are Consistent With Its Legislative Purpose

A. By Its Plain Terms, The Compact Does Not Apply To Parents Because Parents Are Not "Foster Care" Or Candidates For "Adoption"

In the first instance, the Court need look no further than the plain text of the statute in order to conclude that it does not apply to natural parents. The specific provision of the Compact at issue here—Article III—concerns the placement of a child *in foster care* or *prior to a possible adoption*. Placing a child with his parent is simply *not* "placement in foster care or as a preliminary to a possible adoption." § 374-a(1), Art. III(a).

"[I]t is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add or take away from that meaning." *Myers v. Schneiderman*, 140 A.D.3d 51, 56-7 (1st Dep't 2016). The "definite meaning" of "foster care" in the Compact excludes parental custody.

New York law defines "foster care" as "care provided by an authorized agency to a child in a foster family, free or boarding home; agency boarding home; group home; child care institution; health care facility or any combination thereof"– not a child living with the child's own parent. N.Y. Fam. Ct. Act § 1087(c). Similarly, federal law defines "foster care" as "24-hour substitute care for children placed *away from* their parents or guardians." 45 C.F.R. § 1355.20(a) (emphasis added).

The only federal court of appeals to have addressed the question observed that "[t]he language of Article III is unambiguous" and that "the Compact was intended only to govern placing children in substitute arrangements for parental care." *McComb,* 934 F.2d at 482. Courts around the country have reached the same conclusion, based on the plain language of the text of Article III.

As the Connecticut Supreme Court explained, "[t]he ordinary meaning of the phrase 'for placement in foster care or as a preliminary to a possible adoption as used in . . . article III(a), does not encompass placement with a noncustodial parent. Children in the care of their own parents are not in 'foster care' in any ordinary sense of that phrase, and parents are not required to adopt their own children." *In re Emoni W.*, 305 Conn. 723, 734–36, 48 A.3d 1, 6–8 (2012). *See also In re Dependency of D.F.-M.*, 157 Wash. App. 179, 188–89, 236 P.3d 961, 965 (2010) ("The plain, ordinary meaning of the term 'foster care' is the

placement of a child in a substitute home, one other than that of the child's parents.") (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 897 (1993); BLACK'S LAW DICTIONARY 727 (9th ed. 2009) (*Id.* at n. 23)). The statute "quite plainly provides that it applies only to placement in foster care or a preadoptive home. A biological parent is neither of these." *In re D.B.*, 43 N.E.3d 599, 604 (Ind. Ct. App. 2015), *transfer den'd*, 41 N.E.3d 691 (Ind. 2015).[3]

Indeed, applying the Compact to parents "does not make sense in light of Article 3 which limits the Act ICPC to foster care and possible adoption—neither of which would involve natural parents." *Tara S. v. Superior Court*, 13 Cal. App. 4th 1834, 1837, 17 Cal. Rptr. 2d 315, 316 (1993). *See also In re Johnny S.*, 40 Cal. App. 4th 969, 977, 47 Cal. Rptr. 2d 94, 100 (1995) ("Reading the ICPC as a whole,

[3] *See also In Interest of C.R.-A.A.*, 521 S.W.3d 893, 907 (Tex. App. 2017) (finding the statutory language "unambiguous" and "looking at the plain meaning of the words used . . . hold[ing] that by its terms the ICPC does not apply to interstate placements of children with their parents."); *In re Rholetter*, 162 N.C. App. 653, 664, 592 S.E.2d 237, 243 (2004) (under statutory language which is "clear and unambiguous," Compact did not apply when placing children with their mother); (*In re Alexis O.*, 157 N.H. 781, 787–88, 959 A.2d 176, 182 (2008) ("[t]he plain language of these provisions evinces the intent of the drafters to respect the integrity of the family and to allow parents to plan for the care of their own children unless the children were being placed in foster care or were being adopted.") (citation omitted); *Arkansas Dep't of Human Servs. v. Huff*, 347 Ark. 553, 563, 65 S.W.3d 880, 888 n.3 (2002) ("we hold that the Compact, read as a whole, was intended only to govern placing children in substitute arrangements for parental care, such as foster care or adoption" and that applying it to natural parents is "contrary to the plain language of the statute") (*Id.* at n. 3); *State Div. of Youth & Family Servs. v. K.F.*, 353 N.J. Super. 623, 635, 803 A.2d 721, 728 (2002) (applying Compact to placement with relatives out-of-state inconsistent with "will of the Legislature as expressed by the plain unambiguous language of the statute").

however, we are convinced that the ICPC was not intended to apply to placement with a parent."); *State Dep't of Children & Family Servs. v. L.G.*, 801 So. 2d 1047, 1051 (Fla. Dist. Ct. App. 2001) ("Even if M.G.'s mother's relocation were deemed a "placement," M.G. was never placed into "foster care or . . . [for] possible adoption" as contemplated by Article III(a) of the ICPC.").

B. The Plain Terms Are Consistent With The Stated Legislative Purpose

The unambiguous language of the statute not only comports with common sense, but also reflects the stated legislative purpose behind the enactment of the Compact. The Compact was first proposed specifically to address "common problems arising from the interstate care and placement of children *in foster care or adoptive homes*." *McComb*, 934 F.2d at 479 (emphasis added) (citing *The Secretariat to the Association of Administrators of the Interstate Compact on the Placement of Children*, Guide to the Interstate Compact on the Placement of Children 3 (1990)). When the Compact was drafted, "foster care" had an "established meaning in welfare circles," which the drafters intended to incorporate into the Compact. *Draftsman's Notes on Interstate Compact on the Placement of Children, reprinted in* Roberta Hunt, *Obstacles to Interstate Adoption* 44 (Child Welfare League of America 1972). That "established meaning" excludes living with parents. *See, e.g.,* BLACK'S LAW DICTIONARY 784 (4th ed. 1951) (defining

"foster parent" as "[o]ne who has performed the duties of a parent to the child *of another* . . ."') (emphasis added).

"The detailed draftsman's notes, supplied by the Council of State Governments, reinforce the notion that the [Compact] does not apply to parental placements." *McComb*, 934 F.2d at 481. These notes explain that the Compact "exempts certain close relatives. This was done in order to protect the social and legal rights of the family and because it is recognized that regulation is desirable only in the absence of adequate family control or in order to forestall conditions which might produce an absence of such control." *Id.* (quotation omitted).

Applying the Compact to placements with parents extends the reach of the statute beyond the scope of the issue that it was intended to address, and constitutes an "entanglement with the natural rights of families" that the drafters sought to avoid. *McComb*, 934 F.2d at 481. *See also N.J. Div. of Child Prot. & Permanency v. D.A.G.*, 2018 WL 1308862, at *13 (N.J. Super. Ct. App. Div. Mar. 14, 2018) (rejecting "nonsensical" application of the Compact "to prohibit a court's placement of children with their natural family solely because that family resides in another state" and observing that the "ICPC was intended to *remove*, not to *create*, obstacles to out-of-state placements that are in the best interests of children.") (emphasis added). As the plain language of the statute is unambiguous

and reflects the documented legislative intent of the drafters, the Court need look no further to determine whether it applies to parents. It plainly does not.

C. AAICPC Regulations To The Contrary Are Neither Controlling Nor Persuasive

Despite the unambiguous text of the statute, and the corresponding stated intentions of the drafters, the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) has promulgated a "regulation"—known as "Regulation No. 3"—that purports to extend the reach of the Compact to the placement of a child with his own parent.

This "regulation" is not binding, because it is contrary to the plain meaning and purpose of the statute. *See, e.g.*, *Matter of Lighthouse Pointe Prop. Assoc. LLC v. N.Y. State Dep't of Envtl. Conservation*, 14 N.Y.3d 161,176 (2010) ("[I]f the regulation runs counter to the clear working of a statutory provision, it should not be accorded any weight."). Courts have refused to apply Regulation No. 3 for this reason. *See, e.g.*, *McComb*, 934 F.2d at 481 (refusing to apply Regulation No. 3 because it would impermissibly "expand[] the scope of the Compact beyond that set out in Article III"); *Riverside Cty. Dept. of Public Social Servs. v. B.B.*, 188 Cal. App. 4th 1024, 1036 116 Cal. Rptr. 3d 294, 303 (2010) (holding that the AAICPC's regulations are incompatible with Article III and that the Compact does not apply to out-of-state placements with a parent).

Moreover, Regulation 3 has no legal effect in New York, because it was not promulgated by a New York agency, no notice of this proposed regulation was published, and the public had no opportunity to comment on this proposal. No final version of the regulation was published in the NY Code of Rules and Regulations. Because Regulation 3 does not comply with the minimum procedures proscribed by the New York State Administrative Procedures Act, it is not the law in New York and New York courts should disregard it, as other state courts have done. *See, e.g., In re Alexis O.*, 157 N.H. at 790, 959 A.2d at 184 ("Regulation No. 3, however, is of no effect in New Hampshire. It has not been adopted here and was not promulgated pursuant to our statutes governing the adoption of regulations."); *In re D.F.-M.*, 157 Wash. App. at 192, 236 P.3d at 966 ("The AAICPC regulations have not been adopted in Washington and therefore have no binding effect.").

II. Applying The Compact To Regulate The Placement Of Children With Their Own Parents Is Unconstitutional

As noted above, the correct interpretation of the Compact is straightforward: the language of the statute is clear and consistent with its purpose to regulate out-of-state placements in *non-parental* custody. To the extent there could be any doubt, however, the Constitution resolves that doubt, and demands that parents be exempt from its application.

A. The ICPC Should Be Interpreted To Avoid Violating Children's And Parents' Rights To Family Integrity

The Court of Appeals has long observed that "it is the duty of this court in construing a statute . . . to adopt that construction which saves its constitutionality." *Matthews v. Matthews*, 240 N.Y. 28, 34-35 (1925). Cases relating to the placement of children are no exception. *Matter of Lorie C.*, 49 N.Y.2d 161, 171 (1980). This canon of constitutional avoidance prevents courts from making unnecessary constitutional rulings and encourages resolution on non-constitutional grounds. *Ashwander v. Tenn. Valley Auth*., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Applying that rule of statutory construction here necessitates reading the Compact as inapplicable to placements with parents. Any contrary ruling would require the court to address several core constitutional concerns.

For parents, the "right to direct the upbringing of their children," is "perhaps the oldest fundamental liberty interest recognized by the [Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This right has been deemed "essential," *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), and constitutes "an interest in liberty entitled to constitutional protection." *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).

These constitutional rights granted to parents are supported by constitutional concern for children as well. Indeed, "the Due Process Clause mandates" a presumption in favor of parental custody based on an interest in protecting

children. *Stanley*, 405 U.S. at 657-58. Following that presumption, children have a "reciprocal right[]" to live in a parent's custody, and that right protects children's and parents' "mutual interest in an interdependent relationship." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). *See also Bennett v. Jeffreys*, 40 N.Y.2d 543, 546 (1976) ("The parent has a 'right' to rear its child, and the child has a 'right' to be reared by its parent.").

The reciprocal constitutional rights of parents and children to family integrity are so elemental that the propriety of granting parents custody of their children is presumed. *Southerland v. City of New York*, 680 F.3d 127, 150 (2d Cir. 2012) ("except where emergency circumstances exist a parent cannot be deprived of the custody of his or her child without due process, generally in the form of a predeprivation hearing") (quotations and citations omitted). In *Bennett*, the court recognized that, while the right to family integrity is not absolute, the state requires proof of "surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" before it may infringe on that right. 40 N.Y.2d at 544. *See also id.* at 546 (only "grievous cause or necessity" justifies infringing on family integrity rights) (*citing Stanley*, 405 U.S. at 651).

B. Applying The Compact To Parents Would Violate The Constitution In Multiple Ways

Applying the Compact to prevent children from living with their parents who live across state lines violates these constitutional principles in multiple ways.

First, it infringes on the fundamental right of child and parent to live together without any countervailing compelling interest. While the government surely has an interest in protecting children from unsafe homes, the government "has no interest in protecting children from their parents unless it has some reasonable and articulable" basis to suspect that a parent's home might be unsafe. *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997).

Rather than presuming that children have the right to live with their parents absent proof of "extraordinary circumstances," *Bennett*, 40 N.Y.2d at 544, requiring Compact approval before granting custody to a parent constitutes an implicit presumption that parents who reside outside of New York are *not* entitled to custody. Unless and until the receiving state approves, there is not just a presumption, but a requirement, that the child not be placed with the parent, even if that means placing the child with *strangers* in state custody. Applying the Compact in this way would turn due process and settled precedent on its head. *See, e.g.*, § 2:98, Dispositional orders—Placement under the interstate compact on the placement of children, 10 N.Y. Prac., New York Family Court Practice (2d ed. 2017) ("Even assuming the Compact is applicable, an argument for excusing compliance with the Compact may be raised when denying custody to an apparently fit parent—when, for example, the receiving state has unreasonably

refused to approve the placement—would violate the parent's constitutional due process rights. These constitutional arguments are most compelling when an out-of-state parent recently had custody and/or has a close relationship with the child, and when Compact-related delays become profound.").

Second, it infringes the right of parents and children to a custody decision based on parental fitness. The Compact permits approval only when an executive branch employee in a receiving state deems a placement to be "not . . . contrary to the interests of the child." § 374-a(1), Art. III(d). This standard treats parents the same as any stranger, in violation of the Supreme Court's requirement that a parent be entitled to "a hearing on his *fitness* as a parent before his children were taken from him." *Stanley*, 405 U.S. at 649 (emphasis added).

Third, and relatedly, applying the ICPC to parents unconstitutionally shifts the burden of proof from the state to parents prior to placement. That analysis places the burden of producing evidence of fitness—and more, based on the amorphous "best interests" standard—on the parent, despite the well-settled rule that the state bears the burden of proving a parent unfit. As the court explained in no uncertain terms in *Bennett*:

> [I]ntervention by the State in the right and responsibility of a natural parent to custody of his or her child is warranted if there is *first* a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child. It is *only* on such a premise

> that the courts may then proceed to inquire into the best interest of the child and to order a custodial disposition on that ground.

40 N.Y.2d at 549 (emphasis added). In the same vein, "[l]egislation which authorizes" interference with a parent's right to custody "without the requisite showing of such extraordinary circumstances constitutes an impermissible abridgement of fundamental parental rights." *Matter of Marie B.*, 62 N.Y.2d 352, 358 (1984). Application of the Compact to parents who live in a different state would interfere with fundamental parental rights in exactly this way, in contravention of constitutional protections.

Fourth, applying the Compact to parents unconstitutionally denies children and parents the opportunity to challenge a state agency which reaches an adverse conclusion. Applying the Compact to a parent subjects that parent and his child to the wide discretion of an agency employee in the receiving state. The bureaucracy involved in reviewing a placement under the Compact with a non-custodial parent can be "prone to errors because social workers, utilizing a vague and undefined legal standard, are empowered to make decisions without any judicial oversight." Vivek S. Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 FAM. L.Q. 435, 444 (2006).

Examples of such errors abound, as the Compact's subjective review procedure has led to a denial of a child's placement with an out-of-state parent

under the Compact for reasons unrelated to fitness, including: the amount of living space the parent has, the parent's dated criminal history, or a perceived lack of cooperation by the parent with the caseworker. *See*, *e.g. In re D.F.-M.*, 157 Wash. App. at 193, 236 P.3d at 967 (describing receiving state's determination that fit father lacked adequate bedroom space for his child as "nonsense," and declaring the Compact inapplicable to parents); *see also* Editorial, *Parental Right*, The Sun News, 2010 WLNR 19106917 (Sept. 26, 2010) (non-custodial father was unable to judicially challenge caseworker's opinion that his financial situation was "fragile" and the resulting refusal to endorse placement of father's daughter with him under the Compact).

The risk of erroneous decisions, which would necessarily be against a child's best interest, is therefore high. And yet, in instances where a receiving state's agency may have made an error, administrative review procedures are generally unavailable under state law; nothing in the Compact subjects that agency employee's decision to judicial review. Sankaran, *Perpetuating the Impermanence*, 40 FAM. L.Q. at 444.

Fifth, applying the Compact to parents violates the Equal Protection Clause by treating non-respondent parents who live outside of New York differently from those who live in New York, and treating children with non-New York parents differently than those with New York parents. In addition to the right to family

integrity, living across state lines implicates individuals' constitutional right to travel. *See Saenz v. Roe*, 526 U.S. 489, 499 (1999) (describing the Supreme Court's long history of protecting citizens' right to travel freely throughout the country). Given the fundamental nature of the rights to family integrity and to travel, the state would need to show that applying the Compact to a non-respondent parent was necessary to achieve a compelling state interest. A child cannot be placed in foster care simply because reaching his father's home requires traveling over the George Washington Bridge rather than the Brooklyn or Queensboro Bridges.

As the brief discussion above highlights, the misapplication of the Compact to non-custodial natural parents creates a host of constitutional violations, any *one* of which alone compels the conclusion that the Compact—consistent with its plain terms and purpose—does not regulate the placement of a child with his own parent. Accordingly, courts around the country that have considered the constitutional implications have readily determined that the Compact could not apply to keep a child from his own parent's custody, regardless of where he lives. *See McComb*, 934 F.2d at 481 (noting the "limited circumstances that justify a state's interference with family life," based on Supreme Court precedent) (citing *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) and *Santosky v. Kramer*, 455 U.S. 745 (1982)). *See also In re A.X.W.*, 2011 Mich. App. LEXIS 983 at *19-21

(Mich. Ct. App. May 26, 2011) (discussing the constitutional "Guiding Principles"); *In re Alexis O.*, 157 N.H. at 789, 959 A.2d at 183 ("Biological and adoptive parents have a fundamental liberty interest" protected by the Due Process Clause, which "does not evaporate simply because [the parents] have not been model parents."); *State Div. of Youth & Family Servs.v. K.F.*, 353 N.J. Super. 623, 632-36, 803 A.2d 721,727-28 (2002) (citing *McComb*, 934 F.2d at 481); *Tara S.*, 13 Cal. App. 4th at 1838-39, 17 Cal. Rptr. 2d at 317 (addressing petitioner's argument that "her constitutional right to parent is affected" by the change of custody and holding that "the noncustodial, non-offending parent . . . has every right to custody"); *In re Emoni W.*, 305 Conn. At 736, 48 A.3d at 8 (observing that the "drafters determined that the statute should not be applied to out-of-state parents in light of the constitutionally based presumptions that parents generally are fit and that their decisions are in the child's best interests.") (citations omitted). *Amici* are not aware of any case in which the court considered the constitutional rights inherent in a parent-child relationship and held that the Compact may be used to keep a parent and child apart.

III. Applying The ICPC To Parents Harms Children

The constitutionally protected interests at issue here rest on the norm that living with a fit parent serves a child's best interests. Social science and medical research, as well as *Amici*'s experience in the field, confirm that children suffer

harm when they are separated from their natural parents, and when they spend time in foster care. Applying the ICPC to parents is therefore not only inconsistent with the meaning and purpose of the statute, and offensive to core constitutional principles—it is also bad policy that contravenes the best interests of the child.

A. Separating A Child From A Parent, Especially At A Young Age, Is Extremely Damaging

Separating a child from his family, especially at a young age, can lead to lifelong trauma. A recent statement made by the American Academy of Pediatrics explains, "[s]eparating children from their parents contradicts everything we stand for as pediatricians—protecting and promoting children's health. In fact, highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children." Statement Opposing Separation of Children and Parents at the Border, May 8, 2018.

Academics have studied the issue of family separation for as long as we have had a child welfare system and consistently reached the same conclusions. John Harlow, *Pediatricians Know Why Family Separation is Child Abuse*, CNN, July 10, 2018 (citing studies dating to the turn of the last century).[4] And the

[4] Available at https://www.cnn.com/2018/07/10/opinions/family-separation-child-abuse-harlow/index.html

trauma of childhood family separations are universal. A study focused on children in rural China, for example, also found that kids who were separated from their parents at a young age were more likely to exhibit symptoms of anxiety and depression. This effect was especially pronounced for children separated from both parents. Zhengkui Lui, *et al.*, *Left Too Early: The Effects of Age at Separation from Parents on Chinese Rural Children's Symptoms of Anxiety and Depression*, 99 AMER. J. OF PUB. HEALTH 2049 (2009).

Although younger children who experience longer periods of uncertainty and separation from their parents are at greater risk of emotional and developmental harm, even relatively brief forcible separations from parents can traumatize children. Joseph Goldstein, *et al.*, *The Best Interests of the Child: The Least Detrimental Alternative*, at 41-45 (1996 ed.). This may be so because young children cannot understand why they are being separated from their families. "From the kids' point of view, it's like they are being punished." Erik Eckholm, Waits Plague Transfers of Children to Relative's Care, N.Y. TIMES at A11, June 27, 2008.[5] The resulting feelings of uncertainty and dislocation manifest themselves in a host of ways, including depression, acting out, withdrawal, and poor academic performance. Vivek S. Sankaran, *Perpetuating the Impermanence*, 40 FAM L.Q. at 436 (citing *Fostering the Future: Safety, Permanency and Well-*

[5] Available at https://www.nytimes.com/2008/06/27/us/27foster.html

Being for Children in Foster Care, Pew Commission (2004)). *See also* Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE L. & POL'Y REV. 63, 91-92 (2006).

Many children separated from their parents experience feelings of "increased self-doubt," and often blame themselves for the separation. Monique B. Mitchell & Leon Kuczynski, *Does anyone know what is going on? Examining children's lived experience of the transition into foster care*, 32 CHILDREN & YOUTH SERVS. REV. 437, 437-38 (2010). The "ambiguous loss" experienced by children who are physically and psychologically separated from family members can lead to "states of tension, anxiety, and depression." *Id.* at 438. After separation, "the most predominant domain of ambiguity" was "relationship ambiguity"—concern about the people with whom children would live. That ambiguity "was found to be particularly distressing for children." *Id.* at 443. Such ambiguity is mitigated or eliminated when children live with a known caregiver, especially a parent.

In short, as the American Psychological Association has pointed out, "[d]ecades of psychological research have determined that it is in the best interest of the child and the family to keep families together."[6] *See also* Leonard Edwards, *Reasonable Efforts: A Judicial Perspective*, (2014) (describing the efforts of

[6] Available at http://www.apa.org/advocacy/immigration/separating-families-letter.pdf

courts and legislators to help keep families together rather than separate them). Thus, it makes no sense to allow a state child welfare agency to block or severely delay the unification of a child with his natural parent simply because that parent lives in another state.

B. Foster Care Placements Are Harmful To Children

Foster care is a necessary safety intervention when a child is *not* able to remain with his or her parents. But social science research establishes that foster care placements can impose lasting harm on children. Children placed in foster care are more likely to commit crimes, drop out of school, become dependent on public assistance, experience substance abuse problems, or enter the homeless population. One leading study concluded that children placed in foster care have worse long-term outcomes, including higher rates of juvenile delinquency and teen pregnancy and worse employment opportunities, than similarly situated children who remain at home. Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AMER. ECON. REV. 1583 (2007). These negative outcomes last into adulthood; adults who were in foster care as children have higher rates of crime than similarly situated children who remain at home. Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POLIT. ECON. 746 (2008). Applying the Compact to parents risks even greater harms:

unlike in Doyle's study, where the children kept at home were in troubled families on the margins of removal to foster care, the children affected by the misapplication of the Compact such as in this case have as the alternative a presumptively fit parent.

Other studies confirm that children in foster care are more likely to be emotionally stunted, develop anti-social, aggressive or violent behaviors, or resort to substance abuse. "Children in foster care experience placement instability unrelated to their baseline problems, and this instability has a significant impact on their behavioral well-being." David M. Rubin *et al.*, *The Impact of Placement Stability on Behavioral Well-Being for Children in Foster Care*, 119 PEDIATRICS 336, 336 (2007). And "the potential for normative social development, and relevant neurobiological underpinnings can be compromised" in foster care, especially when a child is frequently moved from one foster home to another. J. Bick & C.A. Nelson, *Early Adverse Experiences and the Developing Brain*, 41(1) NEUROPSYCHOPHARMACOLOGY 177, 179 (2016).

Relocations from one foster care placement to another are exceedingly common, and are highly correlated with a host of negative consequences. A recent study, based on a federal data set of several thousand kids in a few select states, found that a majority of kids in foster care moved to new neighborhoods (72%) and new schools (68%). Most are separated from at least one sibling (66%). "The

impact of changing neighborhoods, switching schools, and experiencing relationship disruption on children's adjustment to a new placement in foster care." Fawley-King, K., Trask, E.V., Zhang, J., & Aarons, G.A., *The Impact of Changing Neighborhoods, Switching Schools, and Experiencing Relationship Disruption on Children's Adjustment to a New Placement in Foster Care*, 63 CHILD ABUSE & NEGLECT 141, 146 (2016).[7]

Amici's experience in New York and around the nation is consistent with these studies. Chronic, systemic failures in the foster care system leave children vulnerable and insecure. Children often fail to receive timely mental health assessments and services; LGBTQ youth are often not placed in affirming homes; older adolescents are often not prepared adequately for employment; young people are often not discharged to appropriate, stable homes; and children's education needs are often not met. Foster care is, of course, sometimes necessary, but only when the state has established that living with the child's parent poses a real danger of abuse or neglect. Applying the Compact to parents violates that basic principle and unnecessarily traumatizes children.

C. Courts And Legislators Have Recognized The Harms That Unnecessary Parent-Child Separations Impose On Children

The well-documented harm to children in being separated from their families and placed in foster care has long been recognized by courts and

[7] Available at http://europepmc.org/abstract/MED/27919001

legislatures, at both the state and federal level. "Consistent with the constitutional protection of family integrity, Congress and the New York State Legislature have expressed a clear preference for the preservation of the family unit by enacting laws to further this goal." *Martin A by Aurora A v. Gross*, 138 Misc. 2d 212, 217 (Sup. Ct. N.Y. Cty. 1987), *aff'd sub nom. Martin A. v. Gross*, 153 A.D.2d 812 (1st Dep't 1989). One such law in New York is the preventive services law and associated regulations, Soc. Serv. L. § 409 *et seq.*, and 18 NYCRR Part 423 *et seq.*, that describe "the steps that must be taken and the services that must be provided to avert or shorten foster care placement." *Id.* at 218.

New York courts have also explicitly recognized the harms of foster care and the necessity of allowing parents to raise their children. *See Matter of Michael B.*, 80 N.Y.2d 299, 310 (1992) ("Extended foster care is not in the child's best interest, because it deprives a child of a permanent, nurturing family relationship."). *See also Matter of Marilyn H.*, 106 Misc.2d 972, 985 (Fam. Ct. N.Y. Cty. 1981) (describing the "persisting repercussions on the child of a year of quasi-desertion, and the harm to a child who cannot be returned to his mother of the continued ambiguity of foster-care instead of adoption"); *Matter of Delores B.*, 141 A.D.2d 100, 114 (1st Dep't 1988), *aff'd sub nom. Matter of Gregory B.*, 74 N.Y.2d 77 (1989) (noting the "psychological harm" that occurs "in terminating the child's bond with his or her parent."); *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 378

(2004) (holding that even when neglect or an imminent risk to a child is found, ACS and the family court still "must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.").

The U.S. Supreme Court has likewise acknowledged the importance of keeping children with their parents, observing that "children suffer from uncertainty and dislocation" while in foster care. *Stanley*, 405 U.S. at 647. And, with the harms foster care can cause in mind, the Court observed that "the State spites its own articulated goals when it needlessly separates [children] from [their] famil[ies]." *Id.* at 653. Similarly, "while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds." *Santosky*, 455 U.S. at 766-67. Indeed, a state has an interest in "in finding the child an alternative permanent home" only "when it is *clear* that the natural parent cannot or will not provide a normal family home for the child." *Id.* at 767 (emphasis in original) (quoting § 384–b.1.(a)(iv)).

Finally, Congress recently reiterated the importance of keeping families together by passing the Family First Prevention Services Act. Title V, Subtitle A therein has the stated legislative purpose of "enabl[ing] States to use Federal funds available under parts B and E of title IV of the Social Security Act *to provide*

enhanced support to children and families and prevent foster care placements." (emphasis added).

This broad New York State and federal legislative and judicial recognition of the harms to children arising from family separation and placement in foster care simply cannot be squared with an application of the Compact to withhold a child from a presumptively fit parent—often with result being the placement of the child with strangers in foster care.

CONCLUSION

Applying the Compact to placements with parents violates the plain language of the statute, the constitutional rights of parents and children, the "best interests of the child" principle, and core precepts of administrative law. It has no legal basis and threatens to harm children. *Amici* urge the Court to rule that the Compact does not apply to placements with parents.

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Respectfully submitted,

ALLISON STILLMAN
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 506-2500

JOSH GUPTA-KAGAN
ASSOCIATE PROFESSOR
UNIVERSITY OF SOUTH CAROLINA
SCHOOL OF LAW
1525 Senate Street
Columbia, SC 29208
(803) 777-3393

Attorneys for Amici Curiae