

PARENTS AND THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: A FLEXIBLE APPROACH

by
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Before an Oregon court can send a child across the Columbia River to live with a Washington foster parent, the authorities on the Washington side must first approve the move. Unless and until that happens, the child stays in Oregon. But what if the Washington “foster” parent is the child’s biological father?

The Interstate Compact on the Placement of Children (ICPC) imposes conditions on the sending of children across state lines to live with foster parents or potential adoptive parents. Courts in different states have long disagreed over whether those conditions ever apply to the placement of children with their own natural parents. This Note discusses the split between the states, past attempts to resolve it, and potential future solutions. The Note concludes that the ICPC should be replaced with a revised compact that is written broadly enough to allow, but not mandate, the application of the compact to natural parents, allowing an interstate commission to adopt binding regulations that specify whether, when, and how the compact applies. Such a compact would provide for both national uniformity and long-term flexibility.

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INTRODUCTION

All 50 states, the District of Columbia, and the U.S. Virgin Islands have enacted the Interstate Compact on the Placement of Children (ICPC).¹ The ICPC imposes requirements that must be met before a “sending agency,” including a court or government agency, can place a child in another state.² If, for example, the “appropriate public authorities in the receiving state” determine that a proposed placement would be “contrary to the interests of the child,” the ICPC prohibits the placement.³ The Compact imposes these requirements in order to ensure that “[e]ach child requiring placement shall receive the maximum opportunity to be placed in a suitable environment.”⁴

¹ *ICPC FAQ's*, AM. PUB. HUMAN SERVS. ASS'N, https://aphsa.org/AAICPC/AAICPC/icpc_fa_q_2.aspx (last visited July 26, 2021).

² *Id.*; INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, at arts. II(b), III(a) (AM. PUB. HUMAN SERVS. ASS'N) [hereinafter ICPC], https://aphsa.org/AAICPC/AAICPC/text_icpc.aspx (last visited July 26, 2021).

³ ICPC, *supra* note 2, at art. III(d).

⁴ *Id.* art. I(a).

However, state courts have long disagreed on the range of “placements” that are subject to the ICPC. Specifically, courts have split over whether the ICPC applies when a sending agency places a child with the child’s natural, non-custodial parent in another state. Many courts have held that the text of the ICPC does not cover placements with parents.⁵ Those courts cite ICPC Article III, which provides that the Compact’s requirements apply when a sending agency sends or brings a child into another state “for placement in foster care or as a preliminary to a possible adoption.”⁶ Because placement of a child with the child’s parent is neither “foster care” nor “preliminary to a possible adoption,” those courts have concluded that the ICPC does not apply to parents.⁷ Other courts, citing the ICPC’s mandate that the Compact’s provisions “shall be liberally construed to effectuate [its] purposes,” have read the Compact text more broadly as not exempting all placements with parents.⁸ Those courts reason that, at least in some cases, effectuating the ICPC’s purpose of ensuring that a child “shall receive the maximum opportunity to be placed in a suitable environment” requires applying the ICPC to placements with parents.⁹

The Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) has attempted to clarify the applicability of the ICPC by adopting regulations that provide that the Compact does apply to placements with parents in some circumstances.¹⁰ But the status of those regulations has added another dimension to the debate. Some courts have held that the ICPC Regulations are “model regulations” at best and are not legally binding.¹¹ Other courts have concluded that even if the regulations would otherwise bind the states, the regulations are invalid because they conflict with the text of the Compact itself.¹²

⁵ *E.g.*, *In re Emmanuel B.*, 106 N.Y.S.3d 58, 64 (N.Y. App. Div. 2019), *leave to appeal dismissed*, 138 N.E.3d 1104 (N.Y. 2019); *In re C.R.-A.A.*, 521 S.W.3d 893, 907 (Tex. App. 2017); *In re Dependency of D.F.-M.*, 236 P.3d 961, 966 (Wash. Ct. App. 2010).

⁶ ICPC, *supra* note 2, at art. III(a).

⁷ *E.g.*, *McComb v. Wambaugh*, 934 F.2d 474, 480 (3d Cir. 1991); *Tara S. v. Super. Ct.*, 13 Cal. App. 4th 1834, 1837 (Cal. Ct. App. 1993); *In re Dependency of D.F.-M.*, 236 P.3d at 965.

⁸ ICPC, *supra* note 2, at art. X; *e.g.*, *Ariz. Dep’t of Econ. Sec. v. Leonardo*, 22 P.3d 513, 519 (Ariz. Ct. App. 2001); *Green v. Div. of Family Servs.*, 864 A.2d 921, 927 (Del. 2004); *Dep’t of Children & Families v. Benway*, 745 So. 2d 437, 438 (Fla. Dist. Ct. App. 1999).

⁹ ICPC, *supra* note 2, at art. I; *e.g.*, *Benway*, 745 So. 2d at 438–39 (citing Kimberly M. Butler, *Child Welfare—Outside the Interstate Compact on the Placement of Children—Placement of a Child with a Natural Parent*, 37 VILL. L. REV. 896, 909 (1992)); *Green*, 864 A.2d at 926.

¹⁰ *ICPC Regulations*, AM. PUB. HUMAN SERVS. ASS’N Reg. No. 3(2)(a)(3), 3(3), 3(4)(26) (July 2, 2001) [hereinafter ICPC Regs.], https://aphsa.org/OE/AAICPC/ICPC_Regulations.aspx.

¹¹ *E.g.*, *In re Alexis O.*, 959 A.2d 176, 184 (N.H. 2008).

¹² *E.g.*, *In re Emmanuel B.*, 106 N.Y.S.3d 58, 65 (N.Y. App. Div. 2019), *leave to appeal dismissed*, 138 N.E.3d 1104 (N.Y. 2019).

On the other side of the split, courts have stated or implied that the regulations are binding, sometimes with very little explanation.¹³

In addition, parents and scholars have raised constitutional objections to the ICPC's application to parents, arguing that such application unconstitutionally infringes the fundamental right of parents to raise their own children.¹⁴ Some courts have accepted such arguments.¹⁵

The split is longstanding. Recent opinions continue to cite decades-old cases in support of decades-old arguments on the issue.¹⁶ The split is also widespread, with numerous states on either side.¹⁷ There is even an intrastate split on this issue between departments of the Appellate Division of the New York Supreme Court.¹⁸ In short, it is a mess.

The split shows no signs of resolution in the near future. A proposed "New ICPC," which would specify when the Compact applies to non-custodial parents, as well as establish an Interstate Commission with rulemaking authority, is still far short of the 35 states necessary for enactment.¹⁹ Consequently, the ICPC, which was meant to provide children across the country with "the maximum opportunity to be placed in a suitable environment,"²⁰ continues to produce uncertainty and disparate outcomes for children and parents, as well as division and confusion among state courts.²¹

This Note discusses the inconsistent application of the ICPC to placements with out-of-state non-custodial parents, the states' failure to resolve the

¹³ *Green*, 864 A.2d at 927; *H.P. v. Dep't of Children & Families*, 838 So. 2d 583, 585 (Fla. Dist. Ct. App. 2003); *Leonardo*, 22 P.3d at 518–19.

¹⁴ *In re R.S.*, 235 A.3d 914, 933–34 (Md. 2020); *In re Emmanuel B.*, 106 N.Y.S.3d at 66–67; *In re Dep't of Servs. For Children, Youth & Their Families, Div. of Family Servs. v. B.T.B.*, No. CS16-01645, 2018 WL 2076253, at *4 (Del. Fam. Ct. Mar. 14, 2018); 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, 80 (2006).

¹⁵ See *In re R.S.*, 235 A.3d at 934 ("[A]ny reading of the ICPC, which concludes that the compact applies to placements with biological parents (who have not been deemed unfit), would conflict with state and federal constitutional law."); *In re Emmanuel B.*, 106 N.Y.S.3d at 59 ("Unless the Family Court has cause to believe a nonrespondent parent in another state might not be fit, or some other extraordinary circumstances exist, presupposing a parent is unfit pending completion of the ICPC process infringes upon that parent's constitutional rights.").

¹⁶ *E.g.*, *In re R.S.*, 235 A.3d at 930–31 (citing *McComb v. Wambaugh*, 934 F.2d 474, 479, 481 (3d Cir. 1991)).

¹⁷ See *infra* Section I.A.

¹⁸ Compare *In re Emmanuel B.*, 106 N.Y.S.3d at 65, with *In re Tumari W.*, 885 N.Y.S.2d 753, 755 (N.Y. App. Div. 2009).

¹⁹ *Interstate Compact for the Placement of Children*, AM. PUB. HUMAN SERVS. ASS'N, <https://aphsa.org/AAICPC/AAICPC/ICPC.aspx> (last visited July 26, 2021).

²⁰ ICPC, *supra* note 2, at art. I(a).

²¹ See *infra* Section I.C.

inconsistency, and possible solutions. Part I of this Note describes the split, the divergent statutory reasoning of the courts on both sides, and why the split fundamentally affects the implementation of the Compact. Part II discusses efforts to resolve the split, including court decisions that call for a uniform approach, as well as the ICPC Regulations that have attempted to provide for limited application of the ICPC to placements with parents. Part III discusses possible solutions to the problem, including possible federal constitutional claims, which the U.S. Supreme Court would have jurisdiction to resolve, and the adoption of a revised ICPC. This Part additionally considers why efforts to revise or replace the ICPC have failed so far. This Note concludes that the solution that is the most likely to provide for uniformity as well as flexibility on this issue is a revised ICPC that creates an interstate agency with authority to adopt regulations that either provide or do not provide for the application of the Compact to placements with parents.

I. THE SPLIT

A. *The Nature and Extent of the Split*

Under the ICPC, a state court or agency may not send or bring a child into another state “for placement in foster care or as a preliminary to a possible adoption” unless certain conditions are met.²² Courts have long disagreed on whether those conditions apply when a court or agency places a child with his or her natural parent or parents in another state. Courts that have held that the ICPC does *not* apply to such placements include courts in Arkansas, California, Connecticut, Kansas, Maryland, New Hampshire, New York (Supreme Court, Appellate Division, First Department), Texas, Washington, and the federal Third Circuit Court of Appeals.²³ Courts that have held that the ICPC *does* apply to such placements—at least in some circumstances—include courts in Alabama, Arizona, Delaware, Florida, Massachusetts, Mississippi, New York (Supreme Court, Appellate Division, Second Department), Oregon, and Vermont.²⁴

²² ICPC, *supra* note 2, at arts. II(b), III(a).

²³ Ark. Dep’t of Human Servs. v. Huff, 65 S.W.3d 880, 888 (Ark. 2002); *In re Patrick S.*, 160 Cal. Rptr. 3d 832, 840 (Cal. Ct. App. 2013); *In re Emoni W.*, 48 A.3d 1, 6–7 (Conn. 2012); *In re S.R.C.-Q.*, 367 P.3d 1276, 1282 (Kan. Ct. App. 2016); *In re R.S.*, 235 A.3d 914, 928 (Md. 2020); *In re Alexis O.*, 959 A.2d 176, 182 (N.H. 2008); *In re Emmanuel B.*, 106 N.Y.S.3d at 64; *In re C.R.-A.A.*, 521 S.W.3d 893, 907 (Tex. App. 2017); *In re Dependency of D.F.-M.*, 236 P.3d 961, 966 (Wash. Ct. App. 2010); *McComb v. Wambaugh*, 934 F.2d 474, 481–82 (3d Cir. 1991).

²⁴ *D.S.S. v. Clay Cty. Dep’t of Human Res.*, 755 So. 2d 584, 590 (Ala. Civ. App. 1999); *Ariz. Dep’t of Econ. Sec. v. Leonardo*, 22 P.3d 513, 519 (Ariz. Ct. App. 2001); *Green v. Div. of Family Servs.*, 864 A.2d 921, 927 (Del. 2004); *Dep’t of Children & Families v. C.T.*, 144 So. 3d 684, 685–86 (Fla. Dist. Ct. App. 2014); *Adoption of Warren*, 693 N.E.2d 1021, 1024–25 (Mass. App. Ct. 1998); *K.D.G.L.B.P. v. Hinds Cty. Dep’t of Human Servs.*, 771 So. 2d 907, 913 (Miss.

The split is longstanding. The text of the Compact—and thus the core of the statutory problem underlying the split—remains unchanged.²⁵ That text, read literally, appears to preclude the application of the ICPC to placement with parents. This Part discusses how the Compact appears to exempt parents, why some courts have held otherwise, and why the courts' disagreement undermines the broader goals of the Compact.

B. *Competing Readings of the Compact*

Courts that hold that the ICPC does not apply to parental placements focus on ICPC Article III(a), which provides that the ICPC applies only when a child is sent to another state “for placement in foster care or as a preliminary to a possible adoption.”²⁶ Courts on the other side of the split have countered this reasoning with language from Article X, which mandates that the ICPC’s provisions “be liberally construed to effectuate the purposes thereof.”²⁷ Those courts argue for a broad reading of Article III(a) that would include certain placements with parents.²⁸ This section considers the statutory reasoning of both sides.

1. *One Side of the Split: The Compact text, read literally, limits its application to situations involving “foster care” and “adoption.”*

a. *Article III: Conditions for Placement*

Article III imposes the “Conditions for Placement” that must be satisfied before a child is sent across state lines.²⁹ Article III(a) specifies the situations to which the “Conditions” shall apply:

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 governing the placement of children therein.³⁰

2000); *In re Tumari W.*, 885 N.Y.S.2d 753, 755 (N.Y. App. Div. 2009); *State ex rel. Juvenile Dep’t of Clackamas Cty. v. Smith*, 811 P.2d 145, 147 n.4 (Or. Ct. App. 1991).

²⁵ See, e.g., *In re R.S.*, 235 A.3d at 930–31 (citing *McComb*, 934 F.2d at 479, 481) (2020 Maryland case drawing from the reasoning of a 1991 Third Circuit case).

²⁶ E.g., *McComb*, 934 F.2d at 480 (quoting ICPC, *supra* note 2, at art. III(a)).

²⁷ E.g., *Leonardo*, 22 P.3d at 520 (quoting ICPC, *supra* note 2, at art. X).

²⁸ E.g., *H.P. v. Dep’t of Children & Families*, 838 So. 2d 583, 585–86 (Fla. Dist. Ct. App. 2003) (citing NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES & AM. PUB. HUM. SERVS. ASS’N., *THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: A MANUAL AND INSTRUCTIONAL GUIDE FOR JUVENILE AND FAMILY COURT JUDGES* 34 (Barbara Seibel ed., 2001)).

²⁹ ICPC, *supra* note 2, at art. III.

³⁰ ICPC, *supra* note 2, at art. III(a) (emphasis added).

The most common statutory argument that the ICPC does not apply to placements with parents can be stated very simply: placement with a parent is neither “foster care” nor “adoption” within the meaning of ICPC Article III(a), and therefore the ICPC’s “Conditions for Placement” do not apply.³¹ This straightforward reading of the text, which appears to comport with the plain meaning of the terms “foster care” and “adoption,”³² has underlain the conclusions of various courts over the past few decades.³³

In *McComb v. Wambaugh*, for example, the Third Circuit, construing the Compact as state law because it was enacted without congressional consent, explained that “[p]roper construction of the Compact begins with a reading of its text.”³⁴ The court concluded that Article III(a) “carefully limited” the scope of the Compact “to foster care or dispositions preliminary to an adoption.”³⁵ The court also looked to documents from the drafting history of the Compact, including the ICPC *Draftsman’s Notes* and the *Suggested State Legislation Program for 1961* published by the Council of State Governments (CSG).³⁶ The court quoted the CSG’s explanation that “[t]he compact provides procedures for the interstate placement of children . . . when such placement is for foster care or as a preliminary to a possible adoption,”³⁷ as well as the *Draftsman’s Notes* statement 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.”³⁸

Another section of the *Draftsman’s Notes*, not cited by the Third Circuit in *McComb*, provides some indirect support for the court’s reading. The *Draftsman’s Notes* distinguish “foster care” from “personal and institutional arrangements which

³¹ *E.g.*, *McComb*, 934 F.2d at 480–81 (analyzing ICPC, *supra* note 2, at art. III(a)).

³² *Foster*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“1. (Of a relationship) involving parental care given by someone not related by blood or legal adoption <foster home>. 2. (Of a person) giving or receiving parental care to or from someone not related by blood or legal adoption <foster parent> <foster child>.”); *Adoption*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The creation by judicial order of a parent-child relationship between two parties who usu. are unrelated; the relation of parent and child created by law between persons who are not in fact parent and child.”).

³³ *E.g.*, *McComb*, 934 F.2d at 480–81; *Tara S. v. Super. Court*, 13 Cal. App. 4th 1834, 1837 (Cal. Ct. App. 1993); *In re Dependency of D.F.-M.*, 236 P.3d 961, 966–67 (Wash. Ct. App. 2010); *In re R.S.*, 235 A.3d 914, 930–31 (Md. 2020).

³⁴ *McComb*, 934 F.2d at 480.

³⁵ *Id.*

³⁶ *Id.* at 480–81 (citing Mitchell Wendell, *Draftsman’s Notes*, reprinted in ROBERTA HUNT, CHILD WELFARE LEAGUE OF AMERICA, INC., OBSTACLES TO INTERSTATE ADOPTION 44 (1972)); SUGGESTED STATE LEGISLATION PROGRAM FOR 1961, at 49 (Council of State Gov’ts 1960)).

³⁷ *Id.* at 480 (quoting SUGGESTED STATE LEGISLATION PROGRAM FOR 1961, *supra* note 36, at 49).

³⁸ *Id.* at 481 (quoting Wendell, *supra* note 36, at 44). For further discussion of the context of this statement in the *Draftsman’s Notes*, see *infra* Section I.B.1.c.

exist to serve temporary and specific functions,” and note that “the term ‘foster care’ has an established meaning in welfare circles sufficient to indicate a relation of some duration as an integral part of the child rearing process.”³⁹ A child’s relationship with a parent, of course, is likely to be “of some duration” and “an integral part of the child rearing process.”⁴⁰ But placement with a parent does not otherwise comport with the “established meaning” of “foster care” at the time of the Compact’s drafting. Sources from the period of the ICPC’s drafting and initial enactment define terms such as “foster parent” to specifically exclude natural parents.⁴¹ On the other hand, the *Draftsman’s Notes* do not emphasize the non-parental nature of “foster care,” and arguably may have intended to leave the language open to broader interpretations.⁴²

b. Article V: Retention of Jurisdiction

The above plain-meaning argument finds further support in the context of the ICPC, specifically Article V, which provides that the sending agency “shall continue to have financial responsibility for the support and maintenance of the child during the period of the placement.”⁴³ In *McComb v. Wambaugh*, the Third Circuit reasoned that, due to this provision, the application of the ICPC to placement with a parent “would result in the anomalous situation of imposing a financial obligation upon a sending state that supersedes parents’ duty to support their children.”⁴⁴ Other courts have drawn similar conclusions.⁴⁵

c. Article VIII: Limitations

Article VIII(a) provides that the ICPC “shall not apply to . . . [t]he sending or bringing of a child into a receiving state by his parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state.”⁴⁶ In *McComb*, the Third Circuit cited Article VIII in support of its reading of the Compact, noting that the Compact does not define the word “guardian” and reasoning that

³⁹ Wendell, *supra* note 36, at 44.

⁴⁰ *Id.*

⁴¹ *Foster parent*, BLACK’S LAW DICTIONARY (4th ed. 1951) (“One who has performed the duties of a parent to the child of another by rearing the child as his own child; ‘foster child.’”); *Foster parent*, BLACK’S LAW DICTIONARY (rev. 4th ed. 1968) (same); *Fosterage*, BLACK’S LAW DICTIONARY (4th ed. 1951) (“Care of a foster child, brother, sister, parent, etc.—one considered as holding the relationship indicated in consequence of nursing and rearing, though not related by blood.”); *Fosterage*, BLACK’S LAW DICTIONARY (rev. 4th ed. 1968) (same).

⁴² See *infra* Section II.B.2 (discussing broad readings of “foster care”).

⁴³ ICPC, *supra* note 2, at art. V(a).

⁴⁴ *McComb v. Wambaugh*, 934 F.2d 474, 480 (3d Cir. 1991).

⁴⁵ *In re Johnny S.*, 47 Cal. Rptr. 2d 94, 99 (Cal. Ct. App. 1995) (citing *McComb*, 934 F.2d at 482); *In re Emoni W.*, 48 A.3d 1, 9 (Conn. 2012).

⁴⁶ ICPC, *supra* note 2, at art. VIII(a).

“[p]resumably if an agency has been appointed guardian, it can place a child in another state with a parent or other relative designated in the Compact without being affected by its terms.”⁴⁷

In other words, the Third Circuit read Article VIII’s first reference to a “guardian” as including an agency that has been appointed guardian of a child. Under that reading, Article VIII would exempt from the ICPC any placement in which an agency guardian places a child with a parent, with any of the other relatives listed in Article VIII, or with a “non-agency guardian.”

The Third Circuit also quoted the *Draftsman’s Notes*, which explain that Article VIII “exempts certain close relatives . . . 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.”⁴⁸ The court concluded that this “decision to avoid entanglement with the natural rights of families is consistent with the limited circumstances that justify a state’s interference with family life”⁴⁹ and with “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child.”⁵⁰

However, the context of the quoted language in the *Draftsman’s Notes* leaves room for uncertainty as to exactly what it means that Article VIII “exempts certain close relatives.”⁵¹ That language—which is the *Draftsman’s Notes’* only direct mention of Article VIII—appears within an explanation of the ICPC’s definition of “sending agency.”⁵² The *Notes* explain that the definition of “sending agency” in Article II(b) “makes it clear that the Compact applies to placements made by either public or private agencies or persons.”⁵³ But the *Draftsman’s Notes* caution that “this definition is to be read in conjunction with Article VIII which exempts certain close relatives.”⁵⁴ Considered in that context, the *Draftsman’s Notes’* brief discussion of “the social and legal rights of the family” seems to explain why Article VIII exempts placements *by* parents and other close relatives, but it does not necessarily explain whether or to what extent the Article exempts placements *with* parents when the placements are made by courts or other agencies.

⁴⁷ *McComb*, 934 F.2d at 480–81.

⁴⁸ *Id.* at 481 (quoting Wendell, *supra* note 36, at 44).

⁴⁹ *Id.* (citing *Moore v. E. Cleveland*, 431 U.S. 494, 499 (1977)).

⁵⁰ *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

⁵¹ Wendell, *supra* note 36, at 44.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

2. *The Other Side of the Split: The Compact text mandates a liberal construction of its provisions, which includes placements with parents.*

Against the apparently limited language of Article III, courts on the other side of the split wield Article I, which states the Compact's "Purpose and Policy," and Article X, which mandates that the Compact's provisions "be liberally construed to effectuate the purposes thereof."⁵⁵ Finding "the *McComb* court's strict and narrow construction of the ICPC" to be "contrary to the mandate of Article X," those courts adopt a looser reading of Article III.⁵⁶

ICPC Article X provides, "The provisions of this compact shall be liberally construed to effectuate the purposes thereof."⁵⁷ Article I lists those purposes:

It is the purpose of the party states to cooperate with each other in the interstate placement of children to the end that:

- (a) Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care.
- (b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child.
- (c) The proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made.
- (d) Appropriate jurisdictional arrangements for the care of children will be promoted.⁵⁸

In *Department of Children and Families v. Benway*, Florida's Fifth District Court of Appeal concluded "that the ICPC should be interpreted to include the placement of a child with his natural parents to 'best ensure that a child is placed in a suitable environment, which, after all, is the main purpose of the Compact.'"⁵⁹ The court further reasoned that "[o]nce a court has legal custody of a child, it would be negligent to relinquish that child to an out-of-state parent without some indication that the parent is able to care for the child appropriately."⁶⁰ The ICPC,

⁵⁵ ICPC, *supra* note 2, at arts. I, X; *e.g.*, *Dep't of Children & Families v. Benway*, 745 So. 2d 437, 438–39 (Fla. Dist. Ct. App. 1999) (citing ICPC, *supra* note 2, at arts. I, X).

⁵⁶ *E.g.*, *Ariz. Dep't of Econ. Sec. v. Leonardo*, 22 P.3d 513, 520 (Ariz. Ct. App. 2001); *Green v. Div. of Family Servs.*, 864 A.2d 921, 927 (Del. 2004).

⁵⁷ ICPC, *supra* note 2, at art. X.

⁵⁸ *Id.* at art. I.

⁵⁹ *Benway*, 745 So. 2d at 439 (quoting *Butler*, *supra* note 9, at 909).

⁶⁰ *Id.*

the court noted, “provides an effective mechanism for gleaning that evidence and for maintaining a watchful eye over the placement.”⁶¹ The court acknowledged that “the ICPC refers to the transfer of the child ‘for placement in foster care or as a preliminary to a possible adoption,’ which of course is not the situation where a child is being sent to live with his or her natural parent.”⁶² Nonetheless, the court concluded that “the ICPC covers the placement of a child with the natural, non-resident parent[.]”⁶³ This construction of the ICPC, with its frank admission that the language of Article III(a) “of course” does not include placements with parents, appears to override the plain meaning of the text.⁶⁴

Other cases demonstrate more nuanced attempts to fit parental placements within the scope of Article III(a). In *Arizona Department of Economic Security v. Leonardo*, the Arizona Court of Appeals, in support of its conclusion that “placement in foster care or as a preliminary to a possible adoption” did not necessarily exclude care by a parent, cited Arizona statutes that provide for “kinship foster care” by a nonparent family member and that make “placement with a parent an alternative placement for a child subject to the child welfare and placement statutes.”⁶⁵ In *H.P. v. Department of Children and Families*, Florida’s Fifth District Court of Appeal, expanding on its earlier decision in *Benway*, reasoned that under some circumstances, placement of a child with a natural parent *is* “foster care.”⁶⁶ The court quoted the *ICPC Manual and Instructional Guide for Juvenile and Family Court Judges*, which states that “when a court takes jurisdiction and determines who is to receive a child, who retains the authority to continue the child with that custodian or to remove the child, and when the court may prescribe supervision or other conditions, the child’s living status is that of a *placement*.”⁶⁷ The *Manual* reasoned that when a court places a child with a parent under those circumstances, the parent’s situation “is the same as the position of a foster parent,” given that “[i]n

⁶¹ *Id.*

⁶² *Id.* at 438 (quoting ICPC, *supra* note 2, at art. III(a)).

⁶³ *Id.* at 439. The court made no mention of the ICPC Regulations issued by the AAICPC, which purport to render the ICPC applicable to parental placements in some circumstances. For a discussion on the content and validity of the ICPC Regulations, see *infra* Part II.

⁶⁴ *Benway*, 745 So. 2d at 438–39.

⁶⁵ *Ariz. Dep’t of Econ. Sec. v. Leonardo*, 22 P.3d 513, 519–20 (Ariz. Ct. App. 2001) (citing ICPC, *supra* note 2, at art. III(a); ARIZ. REV. STAT. ANN. §§ 8-514.03, 8-514.02 (2001)).

⁶⁶ *H.P. v. Dep’t of Children & Families*, 838 So. 2d 583, 586 (Fla. Dist. Ct. App. 2003) (citing NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES & AM. PUB. HUM. SERVS. ASS’N, *supra* note 28, at 34).

⁶⁷ *Id.* (quoting NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES & AM. PUB. HUM. SERVS. ASS’N, *supra* note 28, at 34).

both instances they are caregivers only because of the authority conferred to them by the state acting through the court,” and therefore “the child is in foster care.”⁶⁸

C. *The split fundamentally affects the implementation of the Compact.*

As the California Fourth District Court of Appeal has noted, “there are potentially thorny practical issues arising out of the lack of uniformity in” the ICPC’s application to placements with parents.⁶⁹ For example, ICPC Article IV provides that “[t]he sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact, shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state.”⁷⁰ The California court pointed out that if courts in the sending state hold that a placement with an out-of-state parent does not require an ICPC home study, but the courts in the receiving state hold otherwise, then a sending agency may inadvertently violate the law of the receiving state under Article IV, which could jeopardize that placement as well as possible future placements.⁷¹

Further, the courts in *Benway*, *Leonardo*, and *H.P.* make a plausible argument that, at least in some cases, the ICPC *should* apply to placements with parents. Arguably, application of the ICPC to parents in some situations gives effect to the purposes enumerated in ICPC Article I. As Florida’s Fifth District Court of Appeals argued in *Benway*, when there is a question about the fitness of a parent or the suitability of a placement, the ICPC’s “mechanism for gleaning . . . evidence and for maintaining a watchful eye” could be essential to ensuring that a child “receive[s] the maximum opportunity to be placed in a suitable environment.”⁷² And the ICPC’s mechanism for providing services across state lines could ensure that parents have the same access to services and support in the receiving state as they would in the sending state.⁷³ Even the California Court of Appeal, after concluding that the ICPC does not apply to parents, conceded that “it does not take an expert to

⁶⁸ *Id.* (quoting NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES & AM. PUB. HUM. SERVS. ASS’N, *supra* note 28, at 34).

⁶⁹ *In re C.B.*, 116 Cal. Rptr. 3d 294, 302 (Cal. Ct. App. 2010).

⁷⁰ ICPC, *supra* note 2, at art. IV.

⁷¹ *In re C.B.*, 116 Cal. Rptr. 3d at 302.

⁷² Dep’t of Children & Families v. *Benway*, 745 So. 2d 437, 439 (Fla. Dist. Ct. App. 1999); ICPC, *supra* note 2, at art. I(a).

⁷³ See *Ariz. Dep’t of Econ. Sec. v. Leonardo*, 22 P.3d 513, 520 (Ariz. Ct. App. 2001) (noting that if a child is placed with a parent in Arizona in connection with a pending or ongoing dependency proceeding, the parent is offered services and closely monitored, whereas if the child is in another state, it would be “virtually impossible, both practically and legally,” for the Arizona authorities to prove such services and monitoring).

conclude that there should be *some* way for one state to ask another state to supervise a placement with a parent.”⁷⁴

For similar reasons, even courts that have held that the ICPC does not apply to placements with parents have condoned the use of the ICPC process to investigate or supervise such placements in some cases. In *In re I.G.*, the California Third District Court of Appeal reversed a juvenile court’s decision terminating a child’s dependent status and returning her to her mother’s custody in Washington.⁷⁵ The Court of Appeal explained that “[h]aving found the minor to be a dependent child, the juvenile court was required to continue supervision and dependency until such time as continued supervision was no longer necessary for the minor’s protection.”⁷⁶ The Court of Appeal noted that although California courts have held that compliance with the ICPC is not required for a parental placement, the juvenile court could have used the ICPC to enter into a voluntary agreement with child protection services in Washington, allowing the mother and child to move to Washington under continued supervision to ensure the child’s safety.⁷⁷ Similarly, in *In re Welfare of Ca.R.*, the Washington Court of Appeals affirmed a decision mandating an ICPC investigation before children could be placed with their mother in Nevada.⁷⁸ The court reasoned that although “[t]he ICPC process does not govern placement of children with parents,” the ICPC was an appropriate tool for “cooperation between the two states as the parties work toward reunification.”⁷⁹

Uniform interpretation and application of the ICPC on this issue, one way or the other, would avoid potential state law conflicts that could jeopardize placements, would minimize confusion in courts, and would promote predictability and certainty for children and families undergoing extremely stressful ordeals of family separation and reunification. Uniform answers to the questions of whether, when, and how the ICPC applies to placements of children with their parents would, at the very least, provide a starting point for any future discussion regarding whether, when, and how the ICPC, or a compact like it, *should* apply. A patchwork system in which each state court comes to its own conclusion on whether the ICPC can or must apply does not promote the Compact’s purpose of interstate cooperation to maximize children’s opportunities for suitable placements.⁸⁰

⁷⁴ *In re C.B.*, 116 Cal. Rptr. 3d at 303.

⁷⁵ *In re I.G.*, No. C078248, 2015 Cal. App. LEXIS 7763, at *1, 6–8 (Cal. Ct. App. Oct. 27, 2015).

⁷⁶ *Id.* at *8.

⁷⁷ *Id.* at *12–15.

⁷⁸ *In re Welfare of Ca.R.*, 365 P.3d 186, 188 (Wash. Ct. App. 2015).

⁷⁹ *Id.* at 191–92.

⁸⁰ ICPC, *supra* note 2, at art. I(a).

II. PAST EFFORTS TO RESOLVE THE SPLIT

A. *The Courts*

In 1988, the Third Circuit stressed that “uniformity . . . is important in the construction of a Compact because in some contexts it is a contract between the participating states . . . [and] a participant state may not unilaterally change its terms.”⁸¹ In 2010, the California Fourth District Court of Appeal’s decision in *In re C.B.*, reaching the same conclusion as the Third Circuit as to the application of the ICPC to parents, began its opinion with a quotation from a 1992 law review article: “One of the key elements of any interstate compact is uniformity in interpretation. Uniformity, however, is lacking with respect to the issue of whether the [ICPC] applies to the placement of a child with a natural parent.”⁸² That statement is as true today as it was decades ago.

The split has existed for decades. Courts’ attempts to interpret the Compact have not brought clarity to the issue. Instead, confusion has only grown. A solution will have to come from elsewhere.

B. *The Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC)*

One force that has attempted to clarify the ICPC’s application—but has in some ways merely added another dimension to the debate and to the confusion—is the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC).

1. *Introducing the AAICPC and the ICPC Regulations*

ICPC Article VII provides that the “executive head” of each Compact jurisdiction shall designate a “Compact Administrator,” who “shall be general coordinator of activities under this compact in his jurisdiction and who, acting jointly with like officers of other party jurisdictions, shall have power to promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.”⁸³ In 1974, the Compact Administrators of each ICPC state formed the AAICPC.⁸⁴ Since then, the AAICPC, relying on Article VII, has adopted and amended various “ICPC Regulations.”⁸⁵ Those ICPC Regulations include

⁸¹ *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991).

⁸² *In re C.B.*, 116 Cal. Rptr. 3d 294, 295 (Cal. Ct. App. 2010) (quoting Butler, *supra* note 9, at 916).

⁸³ ICPC, *supra* note 2, at art. VII.

⁸⁴ Sankaran, *supra* note 14, at 71.

⁸⁵ See, e.g., ICPC Regs., *supra* note 10, at Reg. No. 0.01(6) (“This regulation is adopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children.”).

Regulation 3, which provides that the requirements of the ICPC apply to “[p]acements with parents and relatives when a parent or relative is not making the placement as defined in Article VIII (a).”⁸⁶ Regulation 3 further provides that the ICPC does not apply “[w]hen the court places the child with a parent from whom the child was not removed, and the court has no evidence that the parent is unfit, does not seek any evidence from the receiving state that the parent is either fit or unfit, and the court relinquishes jurisdiction over the child immediately upon placement with the parent.”⁸⁷

2. *The Legal Status of the AAICPC and the ICPC Regulations*

Most interstate compacts create an agency or other entity to administer the compact.⁸⁸ When a compact expressly creates an agency, questions of the nature and authority of that agency, including questions of how the agency interacts with existing state and federal law, can easily divide and confuse courts.⁸⁹ Other problems and questions may arise when the connection between a compact and an agency or association is more tenuous.⁹⁰

The text of the ICPC itself does not create or designate an interstate entity to administer the Compact or promulgate rules. Nonetheless, the Delaware Supreme Court and the Arizona Court of Appeals have assumed, without explanation, that the AAICPC adopts regulations “pursuant to authority granted in Article VII.”⁹¹

A liberal reading of Article VII might accord with that assumption. Article VII provides that each Compact Administrator, “*acting jointly with like officers of other party jurisdictions*, shall have power to promulgate rules and regulations.”⁹² While that language does not expressly create an interstate entity, the grant of power to the Administrators “acting jointly” could be read as implicitly authorizing the Administrators’ exercise of collective rulemaking power through an association such as the AAICPC.

⁸⁶ ICPC Regs., *supra* note 10, at Reg. No. 3(2)(a)(3).

⁸⁷ *Id.* at Reg. No. 3(3)(a).

⁸⁸ See JEFFREY B. LITWAK, INTERSTATE COMPACT LAW: CASES & MATERIALS 119 (4th ed. 2020) (noting that “[a]pproximately two-thirds of [interstate] compacts . . . create some type of agency”).

⁸⁹ See, e.g., *id.* at 124 (“Courts often struggle to determine whether a compact agency is or should be treated like a state agency.”).

⁹⁰ See, e.g., Franklin v. Callum, 804 A.2d 444, 445–47 (N.H. 2002) (holding that the NH/VT Solid Waste Project, formed by an agreement between regional refuse disposal districts pursuant to the Interstate Solid Waste Compact, but not specifically authorized by the compact, was an unincorporated association, not a separate legal entity).

⁹¹ Green v. Div. of Family Servs., 864 A.2d 921, 927 (Del. 2004); Ariz. Dep’t of Econ. Sec. v. Stanford, 323 P.3d 760, 764 (Ariz. Ct. App. 2014).

⁹² ICPC, *supra* note 2, at art. VII (emphasis added).

However, even among courts that seem to recognize the AAICPC as the representative body of the Compact Administrators, there is no consensus on whether the AAICPC has power to promulgate regulations that are binding on all Compact jurisdictions. In *Leonardo*, the Arizona Court of Appeals reasoned that by adopting the ICPC and enacting a statute designating a Compact Administrator, Arizona had “implicitly agreed to accept and abide by rules or regulations duly promulgated by the AAICPC.”⁹³ In contrast, the Kansas Court of Appeals, while acknowledging that the AAICPC was “presumably the group of ‘officers’ described in Article VII,” expressed “doubt” that Regulation 3 was validly enacted in Kansas, “given that [the court was] unable to find any regulations issued by the Kansas coordinator of the ICPC.”⁹⁴ Similarly, the New Hampshire Supreme Court stated that Regulation 3 was “of no effect in New Hampshire” because “[i]t has not been adopted here and was not promulgated pursuant to our statutes governing the adoption of regulations.”⁹⁵ The Washington Court of Appeals, concluding that the ICPC Regulations “have no binding effect” because they “have not been adopted in Washington,” contrasted the ICPC with the Interstate Compact for Juveniles (the revised ICJ), which expressly provides for regulations that “shall have the force and effect of statutory law and shall be binding in the compacting states.”⁹⁶

The text of the ICPC, as the Washington court noted, does not expressly state that rules or regulations promulgated pursuant to Article VII shall have the force of law. Nor does the Compact state whether rulemaking must follow each jurisdiction’s statutes governing administrative procedure. The Compact specifies no rulemaking process at all. Indeed, as the AAICPC itself has acknowledged, the Compact was drafted before the development of modern administrative law.⁹⁷ It is therefore no surprise that Article VII has failed to produce a body of uniformly accepted and enforceable regulations.

The drafting history of the Compact provides little guidance. The *Draftsman’s Notes* describe Articles VII through X as “standard Compact provisions which have their counterparts in many Compacts and raise no special problems.”⁹⁸ Article VII’s counterparts in other mid-twentieth-century compacts, however, did raise

⁹³ *Ariz. Dep’t of Econ. Sec. v. Leonardo*, 22 P.3d 513, 518 (Ariz. Ct. App. 2001).

⁹⁴ *In re S.R.C.-Q.*, 367 P.3d 1276, 1280, 1282 (Kan. Ct. App. 2016).

⁹⁵ *In re Alexis O.*, 959 A.2d 176, 184 (N.H. 2008); *see also* *H.P. v. Dep’t of Children & Families*, 838 So. 2d 583, 585 n.3 (Fla. Dist. Ct. App. 2003) (acknowledging but not addressing the argument that “Regulation 3 should not be recognized by Florida courts because it was promulgated by an entity outside of Florida and not subjected to the requirements established by this state for the promulgation of regulations”).

⁹⁶ *In re Dependency of D.F.-M.*, 236 P.3d 961, 966 & n.41 (Wash. Ct. App. 2010) (quoting WASH. REV. CODE § 13.24.011 (2003) (effective Aug. 26, 2008)).

⁹⁷ *History of the ICPC*, AM. PUB. HUMAN SERVS. ASS’N, <https://aphsa.org/AAICPC/AAICPC/ICPC.aspx> (follow “History of the ICPC” hyperlink) (last visited July 26, 2021).

⁹⁸ Wendell, *supra* note 36, at 47.

problems. The 1937 Interstate Compact for the Supervision of Parolees and Probationers (ICSPP), for example, provided that the governor of each compact state could “designate an officer who, acting jointly with like officers of other contracting states . . . shall promulgate such rules and regulations as may be deemed necessary,” but the compact did not formally define the powers or duties of any joint body.⁹⁹ The administrators of the ICSPP formed an association to promulgate rules and policies, which many state and local officials ignored.¹⁰⁰ Similarly, the 1955 Interstate Compact on Juveniles (the original ICJ) included language that was largely identical to ICPC Article VII, resulting in the promulgation of legally questionable rules.¹⁰¹ The problems posed by the ICSPP and the original ICJ were only solved by the replacement of those compacts with new compacts that expressly created interstate commissions with rulemaking authority.¹⁰² Those examples suggest that courts may be asking too much of Article VII and that the only way to clarify its meaning is to replace it.¹⁰³

III. POSSIBLE SOLUTIONS

A. *The U.S. Supreme Court*

1. *Application of the ICPC to parental placements may violate parents’ fundamental rights.*

Applying the ICPC to non-custodial parental placements may infringe upon the fundamental right of a parent to raise his or her own child. In *Troxel v. Granville*, the Supreme Court stated that “the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹⁰⁴ In *Stanley v. Illinois*, the Court

⁹⁹ Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 ROGER WILLIAMS U. L. REV. 71, 110 (2003) (citing Interstate Compact for the Supervision of Parolees and Probationers, 1935–1936 R.I. Pub. Laws 2381).

¹⁰⁰ *Id.* at 110, 112–13.

¹⁰¹ *Interstate Compact on Juveniles*, COUNCIL OF STATE GOV'TS, <https://web.archive.org/web/20100831045701/https://www.csg.org/knowledgecenter/docs/ncic/OriginalCompact-circa1955.pdf> (last visited July 26, 2021); INTERSTATE COMMISSION FOR JUVENILES, BENCH BOOK FOR JUDGES & COURT PERSONNEL 32 (8th ed. 2020), https://www.juvenilecompact.org/sites/default/files/Bench_Book_Web.pdf.

¹⁰² Buenger & Masters, *supra* note 99, at 118; INTERSTATE COMMISSION FOR JUVENILES, *supra* note 101, at 39.

¹⁰³ See *infra* Section III.B (discussing the proposed “New ICPC,” its treatment of parental placements, and how it might be improved).

¹⁰⁴ *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

held that denying a parent custody of a child without allowing for a hearing on the parent's fitness may violate the parent's due process and equal protection rights.¹⁰⁵

Relying in part on those cases, Professor Vivek S. Sankaran has identified two aspects of the ICPC that may violate a parent's procedural due process rights: the potentially lengthy denial of custody during the ICPC approval process and the power of an agency, not a court, to make the ultimate decision.¹⁰⁶ First, Sankaran notes that the ICPC denies a parent the ability to obtain custody of his or her child "for months, if not longer," pending the ICPC investigation, during which time the ICPC "strips courts of the power to place the child with her parent."¹⁰⁷ Second, the ICPC allows a state agency to "continue the separation indefinitely, effectively terminating the parent's rights," by finding that the placement would be "contrary to the interests of the child."¹⁰⁸ Sankaran emphasizes that these decisions are immune from judicial review and that the ICPC provides no process for administrative review.¹⁰⁹ He notes that while some states provide a process to review a placement denial, other states do not.¹¹⁰

Some state courts have been receptive to arguments such as those raised by Sankaran. Recently, in *In re R.S.*, the Maryland Court of Appeals, citing Sankaran and the cases he relies on, concluded that "any reading of the ICPC, which concludes that the compact applies to placements with biological parents (who have not been deemed unfit), would conflict with state and federal constitutional law."¹¹¹ The father and child in *R.S.* "did not have an established parent-child relationship," but the father had "never [been] adjudicated unfit as a parent, nor [had] his parental rights [been] terminated."¹¹² The court held that "[s]ubjecting a biological parent" in such circumstances "to the procedural hurdles and delays associated with an ICPC investigation unnecessarily deprives the individual of the fundamental right

¹⁰⁵ *Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972) (holding that a state could not take custody of children from their unwed father—based on a presumption that unwed fathers are unfit—without holding a hearing to determine father's actual parental fitness).

¹⁰⁶ Sankaran, *supra* note 14, at 80.

¹⁰⁷ *Id.* at 83–84; *see also* Julius Libow, *The Interstate Compact on the Placement of Children—A Critical Analysis*, 43 JUV. & FAM. CT. J., no. 3, 1992, at 19, 22 (noting "[t]he inordinate delay in obtaining approval for placement," which "has frequently been between six months and one year and at times has exceeded one year").

¹⁰⁸ Sankaran, *supra* note 14, at 84.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 84 & n.106; *see also* OR. ADMIN. R. 413-040-0222(4)(b) (2019) ("There is no right to appeal from a denial of an ICPC placement. Following a denial, the sending state may submit a new request if the issues that led to the denial have been corrected.").

¹¹¹ *In re R.S.*, 235 A.3d 914, 934 (Md. 2020).

¹¹² *Id.*

to parent.”¹¹³ The New York Supreme Court, Appellate Division, First Department, has come to a similar conclusion.¹¹⁴

While the ICPC Regulations take steps to narrow the scope of the ICPC and minimize the problems identified by Sankaran and the courts, they are still vulnerable to constitutional challenges. Regulation 3(3)(a) provides that the ICPC does not apply “[w]hen the court places the child with a parent from whom the child was not removed, and the court has no evidence that the parent is unfit, does not seek any evidence from the receiving state that the parent is either fit or unfit, and the court relinquishes jurisdiction over the child immediately upon placement with the parent.”¹¹⁵ In other words, a lack of evidence that the parent is unfit, by itself, does not exempt a parent from the ICPC; all three of the listed conditions must be met, two of which are within the court’s control.¹¹⁶ Regulation 3(3)(a) allows a court to hold up a placement by “seek[ing] evidence” as to the parent’s fitness or refusing to “relinquish[] jurisdiction over the child immediately upon placement.”¹¹⁷

Further, the ICPC Regulations still do not provide for judicial or administrative review of placement denials. In 2011, the AAICPC amended the Regulations to allow a sending state to request consideration of a placement denial, “with or without a new home study.”¹¹⁸ But the new Regulation does not obligate the receiving state to comply with such a request.¹¹⁹ The Regulation provides that “[t]his regulation shall not conflict with any appeal process otherwise available in the receiving state,” but it does not mandate any such process.¹²⁰ Oregon, for one, provides no appeal process.¹²¹ As Sankaran points out, the lack of judicial review allows a state agency to effectively terminate a parent-child relationship, leaving the parent with no way to dispute the decision in the courts—and possibly no way to dispute the decision at all, depending on the processes that the parent’s home state chooses to provide.¹²²

¹¹³ *Id.*

¹¹⁴ *In re Emmanuel B.*, 106 N.Y.S.3d 58, 66 (N.Y. App. Div. 2019) (“Unless the Family Court has cause to believe a nonrespondent parent in another state might not be fit, or some other extraordinary circumstances exist, presupposing a parent is unfit pending completion of the ICPC process infringes upon that parent’s constitutional rights.”), *leave to appeal dismissed*, 138 N.E.3d 1104 (N.Y. 2019).

¹¹⁵ ICPC Regs., *supra* note 10, at Reg. No. 3(3)(a).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at Reg. No. 2(9)(a).

¹¹⁹ *Id.* at Reg. No. 2(9)(a)(2).

¹²⁰ *Id.*

¹²¹ OR. ADMIN. R. 413-040-0222(4)(b) (2019).

¹²² Sankaran, *supra* note 14, at 84 & n.106.

For the above reasons, the ICPC, with or without the Regulations in their current form, is still vulnerable to challenge under the U.S. Constitution. The U.S. Supreme Court would have jurisdiction to resolve such disputes. But, as explained below, the Court cannot be relied upon to fix the fundamental problems with the Compact.

2. *The Supreme Court cannot rewrite the ICPC so that it properly balances the rights of parents and the purposes of the Compact.*

The ICPC does not have congressional consent and therefore does not constitute federal law.¹²³ The construction of such a compact will not, by itself, present a federal question.¹²⁴ However, as discussed above, the applicability of the ICPC to parental placements presents questions which implicate “the fundamental right of parents to make decisions concerning the care, custody, and control of their children” under the Due Process Clause of the Fourteenth Amendment.¹²⁵ The U.S. Supreme Court would have ultimate appellate jurisdiction to resolve such questions.¹²⁶

If the court were to address the constitutional issue, it could hold that the application of the ICPC to a parent in a particular situation does or does not violate the parent’s constitutional rights. Such a holding might provide guidance to the states and the AAICPC about how to apply the ICPC in similar situations and how to draft regulations that stay within constitutional bounds.

However, the Court would not be able to fix the fundamental problem because the problem is the ICPC itself. The ICPC has failed to produce uniformity on the issue of its application to placements with non-custodial parents. ICPC Article III, which specifies the “Conditions for Placement,” has failed to produce consensus as to whether those conditions must ever be applied to placements with parents.¹²⁷ ICPC Article VII, which provides the Compact Administrators with “power to promulgate rules and regulations,” has failed to produce a body of binding regulations that are uniformly accepted and applied by the Compact states.¹²⁸

The Supreme Court might be able to answer specific questions about whether a particular application of the Compact would violate the Constitution. But the

¹²³ *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

¹²⁴ David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987, 1017 (1965).

¹²⁵ *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

¹²⁶ U.S. CONST. art. III, § 2, cl. 2; *id.* art. VI, cl. 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 323, 327–28 (1816).

¹²⁷ ICPC, *supra* note 2, at art. III; *see supra* Section I.B (discussing competing interpretations of “for placement in foster care or as a preliminary to a possible adoption”).

¹²⁸ ICPC, *supra* note 2, at art. VII; *see supra* Section II.B (discussing the validity of the ICPC Regulations).

Court would not be able to rewrite the ICPC to provide a full and definitive set of rules for when and how the Compact applies to parental placements.¹²⁹

The Supreme Court has, on occasion, gone beyond the text of a compact to resolve a dispute. For example, in *Kansas v. Nebraska*, the Court, “invok[ing] equitable principles,” ordered partial disgorgement of Nebraska’s gains resulting from violation of the Republican River Compact and ordered reform of an appendix to a subsidiary agreement of that compact.¹³⁰ But in doing so, the Court stressed two particular features of the dispute that justified imposing equitable relief: the Court’s inherent authority to equitably apportion interstate waterways between states—even when there is a compact—and the congressionally-approved compact’s status as federal law.¹³¹ Neither of those two features would be present in an ICPC case. Further, the Court in *Kansas v. Nebraska* stressed that reform of the appendix would only serve to bring it into conformity with the agreed-upon scope of the compact.¹³² In an ICPC case, the intended scope of the Compact itself would be at issue. Equitable principles such as those underlying *Kansas v. Nebraska* therefore would not justify going beyond the text of the ICPC to modify the states’ obligations under the Compact.

Even if the Court resolves the issue by simply holding that the ICPC can *never* apply to parents, the sparseness of the Compact text would ensure that disagreements over related issues continue to arise.¹³³ In short, the Court would not be able to provide what the Compact itself has failed to produce: uniformity. To achieve that, the states themselves will have to go back to the drawing board.¹³⁴

B. A Revised ICPC

The AAICPC has recognized that the ICPC itself is the problem, acknowledging that “the compact language and procedures are insufficient and antiquated; its rules and procedures are not widely followed or understood; and its current structure lacks enforcement and accountability.”¹³⁵ The AAICPC argues

¹²⁹ See *Texas v. New Mexico*, 462 U.S. 554, 567–68 (1983) (“[O]ur first and last order of business is interpreting the compact.”).

¹³⁰ *Kansas v. Nebraska*, 574 U.S. 445, 448–49, 455 (2015).

¹³¹ *Id.* at 454–55.

¹³² *Id.* at 470.

¹³³ See, e.g., Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 311–15 (1989) (noting that the ICPC does not define “guardian” or “non-agency guardian” and arguing that the Compact’s definition of “placement” is unclear).

¹³⁴ See *In re C.B.*, 116 Cal. Rptr. 3d 294, 296 (Cal. Ct. App. 2010) (“point[ing] out that the resulting lack of uniformity is dysfunctional, that courts and rule makers have not been able to fix it, and hence that it may call for a multistate legislative response”).

¹³⁵ *History of the ICPC*, *supra* note 97.

that the current ICPC, which “was written before the interstate highway system, before the development of administrative law, and before the computer revolutionized the way we live[,] . . . is no longer contemporary for child welfare practice in the 21st century.”¹³⁶

For that reason, the AAICPC has proposed a “New ICPC,” the “Interstate Compact *for* the Placement of Children.”¹³⁷ So far, the New ICPC has failed to launch. The new compact provides that it will become effective upon enactment by at least 35 states.¹³⁸ But more than a decade since its initial proposal, the number of states stands at 13, with no new enactments since 2013.¹³⁹ This section discusses how the New ICPC would address placements of children with parents, as well as whether another approach would provide for a more durable and more flexible compact.

1. *The “New ICPC”*

In 2004, the American Public Human Services Association (APHSA), a nonprofit organization that provides secretariat resources and services for the AAICPC,¹⁴⁰ “adopted a policy resolution directing a rewrite of the ICPC.”¹⁴¹ The APHSA assembled a “development and drafting team,” including state human service administrators, state and local child welfare directors, compact administrators, and representatives from various national organizations, to identify issues with the current ICPC and provide recommendations for addressing those issues.¹⁴² Then, from 2004 through 2005, a drafting team circulated two drafts of a revised compact for review and comment.¹⁴³ States and stakeholders submitted their comments and concerns, which the APHSA and the drafting team compiled and integrated.¹⁴⁴ In June 2005, an issue memorandum was circulated, asking state human service administrators to submit their positions on which direction the

¹³⁶ *Id.*

¹³⁷ *Id.*; THE NEW ICPC (AM. PUB. HUMAN SERVS. ASS’N, Final Draft 2009) [hereinafter NEW ICPC] (emphasis added), <https://aphsa.org/AAICPC/AAICPC/ICPC.aspx> (follow “Proposed Legislative Language” hyperlink) (last visited July 26, 2021).

¹³⁸ NEW ICPC, *supra* note 137, at art. XIV(B).

¹³⁹ *See generally* OHIO REV. CODE ANN. § 5103.20 (West 2006); MO. ANN. STAT. § 210.620 (2007); ME. REV. STAT. ANN. tit. 22, § 4251 (2007); OKLA. STAT. ANN. tit. 10, § 577 (West 2008); ALASKA STAT. ANN. § 47.70.010 (2008); FLA. STAT. ANN. § 409.408 (West 2009); DEL. CODE ANN. tit. 31, § 381 (2009); MINN. STAT. ANN. § 260.93 (West 2009); NEB. REV. STAT. ANN. § 43-1103 (LexisNexis 2009); WIS. STAT. ANN. § 48.99 (West 2010); LA. CHILD. CODE ANN. art. 1623 (2010); IND. CODE ANN. § 31-28-6-1 (West 2012) (effective July 1, 2012); KY. REV. STAT. ANN. § 615.030 (West 2013).

¹⁴⁰ Sankaran, *supra* note 14, at 71.

¹⁴¹ *History of the ICPC*, *supra* note 97.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

compact should go for each issue.¹⁴⁵ The final draft of the compact was based on the positions of a majority of state administrators.¹⁴⁶ In November 2005, the APHSA submitted that draft to the states for final approval,¹⁴⁷ and in 2006, Ohio became the first state to enact the New ICPC.¹⁴⁸

The New ICPC would allow for the application of the ICPC to parents, and the proposed compact text expressly delineates when it would apply to such placements. The New ICPC does not contain the language from the old ICPC that limits the application of the Compact to situations involving “foster care” or “adoption.”¹⁴⁹ But the New ICPC provides that the Compact shall not apply to the placement of a child with a non-custodial parent when:

- a. The non-custodial parent proves to the satisfaction of a court in the sending state a substantial relationship with the child; and
- b. The court in the sending state makes a written finding that placement with the non-custodial parent is in the best interests of the child; and
- c. The court in the sending state dismisses its jurisdiction in interstate placements in which the public child placing agency is a party to the proceeding.¹⁵⁰

Including language in the New ICPC itself that specifies when the Compact applies to parental placements might achieve uniformity. But one disadvantage of including that language in the Compact itself, rather than in regulations, lies in the rigidity of the Compact. Under the New ICPC, a new interstate commission would have power to propose amendments to the Compact, but those amendments would become effective only when “enacted into law by unanimous consent of the member states.”¹⁵¹ If a problem or disagreement were to arise regarding the New ICPC’s application to parents, it would be impossible to adjust the Compact without convincing *all* of the Compact states to agree on an amendment. However, the New ICPC’s rulemaking provisions suggest a potential alternative approach.

The New ICPC would grant rulemaking power to a new “Interstate Commission for the Placement of Children.” Unlike the current ICPC, which devotes one sentence to the functions and powers of the Compact Administrators—and half of that sentence to rulemaking—the New ICPC contains six articles which are devoted wholly or largely to this new Commission.¹⁵² The Commission would

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ OHIO REV. CODE ANN. § 5103.20 (West 2006).

¹⁴⁹ Compare NEW ICPC, *supra* note 137, at art. III, with ICPC, *supra* note 2, at art. III(a).

¹⁵⁰ NEW ICPC, *supra* note 137, at art. III(B)(5).

¹⁵¹ *Id.* at art. XIV(C).

¹⁵² *Id.* at arts. VIII–XIII.

have power to promulgate rules, provide for dispute resolution, issue advisory opinions, and enforce compliance with the compact and the rules.¹⁵³ The New ICPC provides that the Commission's rules "shall have the force and effect of administrative rules and shall be binding in the compacting states to the extent and in the manner provided for in [the] compact."¹⁵⁴

The creation of an interstate entity with the power to promulgate binding rules is key to achieving uniformity. The rules have an advantage over the text of the Compact itself in that they are more flexible and responsive to the compact states. Under the New ICPC, each state would have one vote on the Interstate Commission.¹⁵⁵ Further, state legislatures would have the power to override a rule: if a majority of state legislatures, "in the same manner used to adopt the compact," enacts a statute or resolution rejecting a Commission rule, then "such rule shall have no further force and effect in any member state."¹⁵⁶ That provision would afford state legislators and their constituents a continuing opportunity to affect the operation of the Compact short of withdrawal or unanimous amendment.

By allowing the Commission to decide the specifics of the Compact's application, subject to being overruled by a majority of state legislatures, the New ICPC would provide much-needed flexibility. However, as discussed in the next section, another compact provides an example of how a revised ICPC could be even more flexible with regard to parental placements.

2. *A new proposal for a revised ICPC should grant an Interstate Commission the power to determine through regulation whether, when, and how the Compact applies to parental placements.*

In considering how the ICPC might address the issue of parental placements, the history of the Interstate Compact for the Supervision of Parolees and Probationers (ICSPP) provides a useful parallel. The ICSPP, first adopted in 1937, set forth principles regarding the movement of adult probationers and parolees from a "sending state" to a "receiving state."¹⁵⁷ The ICSPP was simple on its face, but its application became fragmented over time.¹⁵⁸ The ICSPP was silent on issues such as whether it applied to people in alternative sentencing programs or supervised pre-trial status.¹⁵⁹ The ICSPP provided that the governor of each compact state could "designate an officer who, acting jointly with like officers of other contracting states . . . shall promulgate such rules and regulations as may be deemed necessary," but

¹⁵³ *Id.* at arts. VIII, IX(A)–(D).

¹⁵⁴ *Id.* at art. XI(D).

¹⁵⁵ *Id.* at art. VIII(B).

¹⁵⁶ *Id.* at art. XI(F).

¹⁵⁷ Buenger & Masters, *supra* note 99, at 107–08.

¹⁵⁸ *Id.* at 108.

¹⁵⁹ *Id.* at 108–09.

the compact did not formally define the powers or duties of any joint body.¹⁶⁰ The Parole and Probation Compact Administrator's Association, with questionable legal authority, promulgated rules and policies to implement the ICSPP, which many state and local officials ignored.¹⁶¹

The parallel with the ICPC is clear. An old compact with simple text, expressing broad principles and providing no clear method of adopting uniform regulations, produces confusion and inconsistency.¹⁶² The solution adopted by the states in replacing the ICSPP may be instructive for how a revised ICPC could deal with the question of parental placements.

In the 1990s, the National Institute of Corrections (NIC) conducted a two-year study of the ICSPP and produced a report with specific recommendations for a new compact, including "[a] national governance commission to regulate the compact" with "authority to make binding rules and regulations."¹⁶³ The NIC and CSG then began a process of drafting what would become the Interstate Compact on Adult Offender Supervision (ICAOS).¹⁶⁴

Most of the ICAOS is devoted to establishing a powerful interstate commission with rulemaking, management, operational, and enforcement authority.¹⁶⁵ The ICAOS is silent as to the specifics of policy matters; instead, it leaves such decisions to the Commission.¹⁶⁶ Rather than merely regulating the movement of adult offenders, the ICAOS creates a regulatory scheme through which the Commission can regulate the conduct of member states.¹⁶⁷ Such an approach allows for flexibility to adapt the compact without having to resort to amendment.¹⁶⁸ Specifically, the ICAOS replaced the terms "parolees and probationers" with the inclusive term "adult offenders," giving the Commission broad authority to regulate the entire adult offender population and rulemaking authority to answer specific questions of regulation of particular populations.¹⁶⁹

That approach is exactly what a reformed ICPC would need. The proposed New ICPC already incorporates some of the strengths of ICAOS by creating its own powerful Interstate Commission. However, regarding the Compact's application to parental placements, the New ICPC does not balance power with flexibility.

¹⁶⁰ *Id.* at 110 (citing Interstate Compact for the Supervision of Parolees and Probationers, 1935–1936 R.I. Pub. Laws 2381).

¹⁶¹ *Id.* at 110, 112–13.

¹⁶² *Id.* at 108.

¹⁶³ *Id.* at 116 n.116.

¹⁶⁴ *Id.* at 116.

¹⁶⁵ *Id.* at 118.

¹⁶⁶ *Id.* at 117, 119.

¹⁶⁷ *Id.* at 117, 122–23.

¹⁶⁸ *Id.* at 121.

¹⁶⁹ *Id.*

A revised ICPC would best achieve that balance by adopting an approach to parental placements that mirrors the ICAOS approach to people in alternative sentencing programs or supervised pre-trial status. The text of the revised ICPC itself would be worded broadly enough to allow, but not mandate, the application of the Compact to parental placements. The Interstate Commission would then be free to define, adjust, or abolish the Compact's application to those placements by enacting rules that are unquestionably binding on every Compact jurisdiction. Each state, acting through its representatives on the Commission, would have a say in the rulemaking that would define the Compact's application to parents. A majority of state legislatures could override any regulation. Such a compact would at last provide uniformity on this issue while also allowing for change. Rather than locking in a position on a controversial issue, such a compact would be able to shift its approach in response to policy concerns or constitutional challenges.

The proposed New ICPC would provide these mechanisms for making and rejecting rules.¹⁷⁰ But by solidifying the Compact's application to parental placement within the text of the Compact itself, the New ICPC would fail to apply its greatest strength—its flexibility—to an area where it is most needed. Much like the broad language of the ICAOS encompassing all “adult offenders,” a truly durable ICPC would be written broadly enough to encompass placements with parents, but would leave to the Commission the precise questions of whether, when, and how the Compact applies to such placements under particular circumstances.¹⁷¹ Under such a system, the Compact would be strong enough to impose uniformity, but flexible enough to stand the test of time.

V. CONCLUSION

The application of the ICPC to placements of children with non-custodial parents is just one of the problems that plagues the Compact. The problem provides a striking illustration of how a compact can fracture. If a future compact is to provide a more durable, flexible, and reliable solution, this troublesome aspect of the ICPC may serve as a helpful example of what does not work. A future compact must be flexible and durable enough to address not only the problems of the past, but also the unforeseen developments of the future. A compact modeled after the ICAOS would provide that flexibility for decades to come.

¹⁷⁰ NEW ICPC, *supra* note 137, at arts. VIII(B), XI(F).

¹⁷¹ Buenger & Masters, *supra* note 99, at 121.