COMMONWEALTH OF MASSACHUSETTS

\_\_\_\_\_\_\_\_\_\_\_\_\_, ss                          \_\_\_\_\_\_\_\_\_ JUVENILE COURT

                                      \_\_\_\_\_\_ DIVISION

DOCKET NO. \_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

IN RE:

Care and Protection of

\_\_\_\_\_\_\_\_\_\_\_ (DOB: \_/\_/\_\_)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**MOTION FOR IMMEDIATE**

**CUSTODY TO FATHER**

\_\_\_\_\_\_\_, Father in this matter (“Father”), respectfully moves that this Court grant him custody without the need for a home study under the Interstate Compact on the Placement of Children (“ICPC” or “Compact”).  A home study is unnecessary because the ICPC applies to placements for foster care or adoption, not for custody orders to parents. Further, the home study requirement would deprive Father of his state and federal due process rights to the care and custody of his child. It would also violate his right to equal protection of the laws, and his right to migrate between states. This Court’s inability to circumvent or override the home study requirement violates Father’s right of access to the courts, as well as the state’s separation of powers and the inherent power of the Court.

In support of this motion, Father respectfully represents as follows:

**BACKGROUND**

1. [Facts about filing of case, where everybody lives, who has custody and from which court. Make sure you have an affidavit from the client that covers all of the facts in this “Background” section.]
2. [Include facts about the good relationship between the client and the child, if any – living with, visits, etc.]

3. [Note that the client has no history with Massachusetts or his home state’s protective services, as well as no criminal background. If his agency and criminal history exist but are minor or old, note that.]

4. [Note whether DCF concedes that the client is fit and doesn’t pose a risk of harm to the child. Note, as well, if the court has made a finding (written or oral) like that: “I find Father fit, but I can’t send the child to Florida. If it weren’t for the ICPC, sir, I’d send the child to you right away.” Or something like that.]

8. A home study by the State of \_\_\_\_\_\_ can take months; given the current pandemic, it is likely that it would take longer. [Find out, if possible, how long a home study will take in the relevant state.]

**DISCUSSION**

The ICPC applies to placements for purposes of foster care and adoption; it does not apply to grants of custody to out-of-state parents. This intent is clear in the language and history of the ICPC, and DCF’s regulations to the contrary exceed the scope of ICPC legislation. Applying the ICPC to parents also violates their right to due process, the right equal protection, the right to migrate, and their right to access to the courts. In addition, it would violate the separation of powers between the branches of government, encroaching upon judicial authority.

**1. Custody to Father is not a “placement” within the plain language of the ICPC statute.**

Article III(a) of the Compact, enacted as G.L. c. 119 App. § 2-1, Art. III(a), limits application of the Compact to “placement in foster care or as a preliminary to an adoption.” A grant of custody to a child’s parent is neither of those things. This in itself ought to be dispositive. *See* *McComb v. Wambaugh*, 934 F.2d 474, 480 (3d Cir. 1991) (finding the ICPC inapplicable to parents and noting that “[t]he most significant and, to our minds, determinative language is found in Article III(a)[.]”); *see also In re Dependency of D.F.-M.*, 236 P.3d 961, 965 (Wash. Ct. App. 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.”).

The Supreme Court of New Hampshire found the language of the statute to be “unambiguous” in that it does not apply to parents. *In re Alexis O.*, 959 A.2d 176, 183 (N.H. 2008). After considering the Compact as a whole, it agreed with the Third Circuit in *McComb* that Article III(a) is determinative: “a placement pertains *only* to substitutes for parental care. It does not apply to care for a child by his or her natural parent.” *Id*. at 182 (emphasis in the original).

Although the *Alexis O.* court found the plain meaning of the statute sufficient to establish its inapplicability to parents, it found that the legislative history further supported its interpretation. The court pointed to the detailed draftsmen’s notes, which explain that the ICPC “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.” *Alexis O.*, 959 A.2d at 183 (citing *Draftsman's Notes on Interstate Compact on the Placement of Children, reprinted in* R. Hunt, *Obstacles to Interstate Adoption* 44 (1972)). Given the drafters’ concern for protecting the natural rights of families, the court found that the history of the ICPC “confirms that its drafters intended it to apply only to the placement of a child for foster care or as a preliminary to adoption. The drafters did not intend for it to apply to natural parents.” *Id*.; *see* *also* *In re Emoni W.*, 305 Conn. 723, 48 A.3d 1, 6 (2012) (ICPC does not apply to out-of-state non-custodial parent); *Donald W. v. Dep’t of Child Safety*, 247 Ariz. 9, 444 P.3d 258, 269 (2019) (ICPC has no application to out-of-state parent unless child found dependent as to that parent).

This case is not governed by *Adoption of Warren*, 44 Mass. App. Ct. 620 (1998), or *Custody of Quincy*, 29 Mass. App. Ct. 981 (1990). In *Warren*, the issue was whether the ICPC applied when the agency *placed* a child with an out-of-state father. (That is, the child remained in agency custody while living with the father.) A *placement* with an out-of-state parent, in which the child remains in state custody, may constitute a “foster placement” under the ICPC. But Father, here, is not asking for placement. In *Quincy*, the court gave custody to a father in New Hampshire, but the father and the Massachusetts Department of Social Services (DCF’s predecessor agency) wanted Massachusetts to pay for services for the child in New Hampshire once the case was dismissed. There is no cross-border services payment at issue here; Father is not asking Massachusetts to pay for any services for the Child, so the ICPC is not implicated. Moreover, the ICPC discussion in *Quincy* is dicta (the case was dismissed as moot), all parties assumed on appeal that the ICPC applied, and the issue was never even mentioned before the trial court, *see* 29 Mass. App. Ct. at 981, so the issue was never actually litigated before an appellate court. This issue is, therefore, once of first impression in Massachusetts.

**2. Regulations purporting to extend coverage of the ICPC to placements with parents are invalid for exceeding the scope of the statute.**

DCF may argue that it has regulations that extend the reach of the ICPC statute to parents. But regulations that exceed the scope of the authorizing statute are invalid. *See* *Massachusetts Hosp. Ass’n, Inc. v. Dept. of Med. Sec.*, 412 Mass. 340, 342 (1992) (stating that agencies may not “promulgate rules or regulations that conflict with the statutes or exceed the authority conferred by the statutes[.]”).

The Compact Administrators, in the introduction to their manual, acknowledge that “[t]he Compact applies to placements preliminary to possible adoptions, placements in foster care where no adoption is contemplated, and institutional placements of adjudicated delinquents needing special services or programs not available within the state.” 1 American Pub. Welfare Ass'n, *Compact Administrators' Manual* at 1.01. Nonetheless, the Compact Administrators have proposed regulations for the implementation of the ICPC, which DCF promulgated as 110 C.M.R. 7.500-7.523 (2018, updated 2019). These regulations purport to extend the ICPC to placements with out-of-state parents. According to 110 C.M.R. 7.507:

If a court enters an order which alters custodial rights which had been previously adjudicated in a divorce, separation or other legal proceeding, and such order places a child with a previously non-custodial parent in a state other than the one in which the child currently resides, there is a placement within the meaning of the Compact.

This exceeds and contravenes the statutory language of the ICPC, because a custody order to a parent is not a placement for “foster care or as a preliminary to adoption” per the statute. G.L. c. 119 App. § 2-1, Art. III(a). Because it exceeds the authority granted by the statute, this regulation is invalid.

In addition to *Emoni W.* (Connecticut in 2012), *Donald W.* (Arizona in 2019), and *Alexis O.* (New Hampshire in 2008), mentioned above, many other state appellate courts have agreed with *McComb* that the Administrators’ regulations purporting to extend the ICPC to parents are invalid for exceeding the scope, or contravening the purpose, of the ICPC statutes. *McComb*,934 F.2d at 481 (finding the regulation “is of no effect and the statutory language must govern” since the regulation expanded the scope of, and is inconsistent with, the statute). For example:

* *In re R.S.*, 470 Md. 380, 235 A.3d 914, 928 (2020) (“Based on the plain, unambiguous language of the relevant statutory provisions, we hold that the ICPC does not apply to interstate placements with non-custodial biological parents.”);
* *In re Emmanuel B.*, 175 A.D.3d 49, 57, 106 N.Y.S.3d 58 (2019) (“Regulation 3 [purporting to cover placements with parents] is inconsistent with the stated purpose of the ICPC and improperly expands the statutory language to apply to situations not within the intended scope of the statute.”);
* *In Interest of C.R.-A.A.*, 521 S.W.3d 893, 904 (Tex. Ct. App. 2017) (adopting the reasoning of states that “have rejected application of the ICPC to interstateplacement of a child with a natural parent” based on plain language of Art. III);
* *In re S.R.C.-Q*., 52 Kan. App. 2d 454, 464, 367 P.3d 1276 (2016) (“[W]e hold that the ICPC applies only to out-of-state placements of children with foster care or as a preliminary to a possible adoption, not to out-of-state placements with a parent.”);
* *In re D.B.*, 43 N.E.3d 599, 604 (Ind. Ct. App. 2015) (“[T]he plain language of the statute makes clear that the ICPC only applies to the placement of a child in foster care or as a preliminary to a possible adoption[ ]” and “[a] biological parent is neither[.]”);
* *In re C.B.*, 188 Cal. App. 4th 1024, 1026 (Cal. Ct. App. 2010) (“California cases have consistently held that the ICPC does *not* apply to an out-of-state placement with a parent.”);
* *In re Dependency of D.F.-M.*, 236 P.3d 961, 965 (Wash. Ct. App. 2010) (“[The regulation] cannot control because it impermissibly expands the scope of the ICPC beyond that established in article III.”);
* *Ark. Dept. of Human Servs. v. Huff*, 65 S.W.3d 880, 888 (Ark. 2002) (holding that the Compact was not intended to apply to placements with parents, and therefore regulations to the contrary were invalid);
* *State, Div. of Youth and Family Serv. v. K.F.*, 803 A.2d 721, 727 (N.J. Super. Ct. App. Div. 2002) (agreeing with *McComb* that the regulations are contrary to the statute’s plain meaning).

The Massachusetts statute and regulations are identical to those of the other states. The Massachusetts regulations exceed the ICPC’s statutory authority in the same way as the regulations exceed the statutes in those other states. Accordingly, the DCF regulations are invalid. The ICPC therefore does not apply to custody orders to out-of-state parents.

**3. A months-long deprivation of the custody of his son is an impermissible violation of Father’s due process rights.**

As noted above, DCF does not allege, and has presented no evidence, that Father is unfit or poses a risk of immediate harm to his son. At most, DCF claims to lack information about him, which Father can “remedy” with a social worker interview or in-person or telephonic testimony with this Court. Such a delay – amounting to hours, perhaps even a day or two – might not offend Father’s or Child’s due process rights. But a home study will likely take months to complete.[[1]](#footnote-1) Depriving Father of his son, and the son of his Father, for months is an unacceptable violation of Father’s (and Child’s) substantive due process rights to family integrity and Father’s (and Child’s) procedural due process right to be heard at a meaningful time and in a meaningful manner.

The substantive and procedural due process rights at issue here are interrelated; both are considered in the procedural due process analysis. In determining the nature and extent of the process that is due to Father (and Child), three factors must be balanced: first, the private interest at stake; second, the risk of erroneous deprivation of that interest through the procedures used; and third, the state’s interest. *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976).

Here, the private interest at stake is a parent’s interest in the care and custody of his child, “perhaps the oldest of the fundamental liberty interests recognized[.]” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Court in *Troxel* concludes that “it cannot now be doubted 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.” *Id*. at 66. Application of the ICPC’s home study requirement to Father, requiring him to wait months for his son to be sent to him, violates his well-established substantive due process rights as a parent.

The second factor, the risk of erroneous deprivation, likewise weighs against application of the ICPC. During the months Father (and Child) must wait for completion of the home study, there is no judicial determination of his rights whatsoever. Meanwhile, there are no allegations that Father is unfit under G.L. c. 119, § 26 or poses an immediate risk of harm under G.L. c. 119, § 24. Parents are presumed to be fit, and that presumption must be overcome before they may be constitutionally deprived of their rights as parents. *See* *Troxel*, 530 U.S. at 58. But, during the home study “wait,” the State need not overcome anything; rather, Father is deprived of his child and enjoys no procedural, evidentiary, or even constitutional protections whatsoever. Erroneous deprivation is not simply a risk here; it is a certainty.

The third factor to be balanced is the State’s interest. The State has a *parens patriae* interest in protecting the child, which sometimes justifies the temporary deprivation of a parent’s right to his child. For example, Massachusetts law allows the state to take emergency custody of a child for up to 72 hours before a hearing under G.L. c.119, § 24, and the permissibility of that brief deprivation prior to a hearing is not contested. *See Care and Protection of Robert*, 408 Mass. 52, 60 (1990) (noting that temporary removal pending the 72-hour hearing is acceptable given the state’s interest in protecting the child). However, with no findings (or allegations) of parental unfitness or protective concerns, the State has no compelling interest that justifies a delay in granting custody to Father.

Based on the *Mathews* test, the application of the ICPC to parents deprives them of their rights to the care and custody of their children without due process. Brief deprivations of rights – counted in hours, not weeks or months – are permissible when they are necessary to protect important state interests. But a deprivation of weeks or months clearly exceeds the threshold of permissibility.[[2]](#footnote-2) *See* *In re Emmanuel B*., 175 A.D.3d 49, 597, 106 N.Y.S.3d 58 (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.”). As the Maryland Court of Appeals said recently in *In re R.S.*:

As a matter of public policy, 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. Subjecting a biological parent—who has not relinquished his parental rights, had those rights been extinguished by a juvenile court, or has otherwise been determined to be unfit as a parent—to the procedural hurdles and delays associated with an ICPC investigation unnecessarily deprives the individual of the fundamental right to parent.

470 Md. 380, 414, 235 A.3d 914 (Md. Ct. App. 2020). Father, here, is similarly deprived of due process.

**4. Applying the ICPC requirements to Father violates his right to equal protection under the law.**

Requiring a home study for Father merely because he lives across state lines violates his right to Equal Protection. The Equal Protection Clause of the Fourteenth Amendment requires similar treatment of those who are similarly situated. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The state “may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate government objective.” *Lehr v. Robinson*, 463 U.S. 248, 265 (1983).

When a fundamental right is implicated, distinctions drawn by the state are subject to strict scrutiny. *Skinner v. State of Okla.* *ex rel. Williamson*, 316 U.S. 535, 541 (1942). Custody orders under the ICPC implicate the right to the care and custody of a child, which is a fundamental right. *Troxel*, 530 U.S. at 66. Strict scrutiny is therefore necessary. Strict scrutiny “requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876, 882 (2010). Thus, differential treatment of in-state and out-of-state parents is permissible only if the distinction is narrowly tailored to achieve a compelling state interest.

The government objective here is to protect the child. This is a compelling state interest. However, in this case, the state interest in safeguarding the Child does not justify – nor does it even weigh in favor of - withholding custody. Father is fit, there are no protective concerns with regard to Father, and denying him custody based on his out-of-state residence does not further the state’s interest.

The distinction drawn between in-state and out-of-state parents is also not narrowly tailored to the state’s purpose of protecting children. A child is at no greater or lesser risk of harm based on a parent’s home relative to a state line. Thus, the state of residence is not a relevant distinction, much less a narrowly tailored one. Because of this, the distinction between in-state and out-of-state parents is constitutionally infirm. In-state and out-of-state parents must be viewed as similarly situated for the purpose of an equal protection analysis.

For in-state parents, no home study is required as a prerequisite to custody. An in-state father with no allegations of unfitness would be able to gain custody from the Court after a delay of not more than 72 hours. *See* G.L. c. 119, § 24; *Lori*, 444 Mass. at 321 (holding that judge must hold hearing within 72 hours of removal of child from parents). Under the Equal Protection Clause, a similarly situated out-of-state father must be able to obtain that same relief.

Because the distinction drawn is irrelevant to the state’s objective and would result in dissimilar treatment of similarly situated individuals, application of the ICPC to parents would result in a violation of equal protection.

**5. The ICPC requirements as applied to Father violate his privileges and immunities as a citizen.**

Rights that arise from national citizenship are protected under the Privileges and Immunities Clause of the Fourteenth Amendment. 16B Am. Jur. 2d Constitutional Law § 815 (2010). Because these rights are protected by the U.S. Constitution, they may not be abridged or impaired by states. *Id.* Among the rights that the Privileges and Immunities Clause has been recognized to cover is the right to travel among the states and to freely migrate from one state to another. *See Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 902 (1986). This right has “unquestioned historic acceptance” grounded in the federal Constitution. *Id.*

According to the U.S. Supreme Court, a state law can infringe a citizen’s right to travel in three ways: first, if it actually deters travel across state lines; second, if its primary objective is to impede travel; or third, if it uses “any classification which serves to penalize the exercise of that right.” *Id*. at 903. If the right to travel is infringed, the law will be subject to strict scrutiny. *See Id*. at 906 (stating that, to be upheld, a state law burdening the right to travel must be necessary to accomplish a compelling state interest). Actual deterrence or the intent to deter is not required to establish a violation of the right to travel; establishing a classification that penalizes the exercise of the right is sufficient. *See Id.* (indicating that penalization is sufficient to trigger strict scrutiny).

Requiring Father to pass a home study before gaining custody of the Child would violate his right to migrate. It would penalize his exercise of the right as a result of his classification as an out-of-state parent. If Father had remained in Massachusetts, he would not be subject to the ICPC and would be able to gain custody of the Child within 72 hours. *See* G.L. c. 119, § 24; *Lori*, 444 Mass. at 321. In light of this, it is clear that a months-long deprivation (to await completion of a home study) penalizes migration to another state. Thus, the scheme is subject to strict scrutiny. *Soto-Lopez*, 476 U.S. at 906. As explained in Part 4, above, application of the ICPC to parents cannot withstand strict scrutiny. Thus, the imposition of the ICPC requirements is unconstitutional on this basis as well.

**6. Father’s right of access to the courts (and his right to due process) is violated if the court cannot grant him custody because it has de facto delegated that role to executive branch administrators.**

Under the ICPC regulations, this Court is required to await the Florida caseworker’s assessment of Father’s home and be bound by it. This complete transfer of power from the Court to an out-of-state executive agency violates both Father’s due process rights and Father’s right of access to the courts.

Due process guarantees Father the right to be heard at a meaningful time and in a meaningful manner. *See* *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). If a court cannot give him custody, and his rights are at the mercy of an executive agency in another state, he has no right to be meaningfully heard in the juvenile court. *See* *In re R.S.*, 470 Md. 380, 235 A.3d 914, 934-35 (2020) (parent deprived of due process where court deferred to out-of-state agency to decide custody under ICPC); *In re Emmanuel B.*, 175 A.D.3d 49, 60, 106 N.Y.S.3d 58 (2019) (de facto delegation of court’s role in determining custody to executive branch bureaucrat deprives parent of due process).

In addition, Father has no right to access to the courts if the courts refuse to address his custodial status. The right of access to the courts rests on the nature of the individual interest at stake and the availability of redress for any injuries. 16B Am. Jur. 2d Constitutional Law § 667 (2010). Here, the interest implicated is Father’s fundamental liberty interest in the care and custody of the Child. *See* *Troxel*, 530 U.S. at 65. If this Court will not protect Father’s interest, he has no other forum for redress. This Court cannot accelerate the Florida home study process. And if the Florida social worker denies the home study – not enough rooms or square footage in the home, no smoke detectors, etc. – Father must undertake a lengthy administrative review in Florida, assuming such review is available. He cannot obtain review of the social worker’s decision in this Court even though this Court has jurisdiction over the Child.

Thus, the right to obtain redress has been eliminated.

**7. Removing judicial authority over the Child’s placement violates the principle of separation of powers.**

The Massachusetts courts have ultimate authority to determine immediate risk to a child, parental unfitness, and the best interests of the child. This is clearly evidenced in the statutes governing each stage of the child protection process. G.L. c. 119, §§ 24, 25, 26. It is the court’s – and only the court’s – duty to make such determinations. *See, e.g.*, *Adoption of Dora*, 52 Mass. App. Ct. 472, 474-76 (2001) (remanding for judicial determination of choice of plan; judge’s deferral to agency to choose was improper because court had duty to decide).

To fulfill this duty, the court must have authority to make custody orders in accordance with its determinations. Powers “essential to the function of the judicial department, to the maintenance of its authority, or to its capacity to decide cases” are “inherent powers” of the judiciary. *Querubin v. Commonwealth*, 440 Mass. 108, 114 (2003). Courts have “wide inherent power to do justice and to adopt procedure to that end.” *Quincy Trust Co. v. Taylor*, 317 Mass. 195, 198 (1944). The Massachusetts Declaration of Rights protects such inherent authority. *Commonwealth v. Fremont Inv. & Loan*, 459 Mass. 209, 213 (2011). Applying the ICPC to custody orders to parents encroaches upon this established judicial authority. If the ICPC applied “when a fit parent is available but an ICPC home study is negative, all discretion is transferred to an administrative agency in a sister state.” *In re Dependency of D.F.-M.*, 236 P.3d 961, 967 (Wash. Ct. App. 2010). The parent is unable to challenge the caseworker’s determination in court. Vivek 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, 84 (2006). In such a situation, the ICPC may become “an obstacle to the court’s ability to act in the best interests of the child.” *In re Dependency of D.F.-M.*, 236 P.3d at 967. Its capacity to decide cases and do justice would be severely restricted, in violation of its inherent authority.

The state’s freedom in allocating governmental functions is limited. The Supreme Judicial Court has acknowledged that Article 30 of the Massachusetts Declaration of Rights calls for the rigid separation of powers. *Opinion of the Justices*, 365 Mass. 639, 640-641 (1974). The SJC also noted that, while “[s]ome flexibility in allocating functions whose classification would be at best ambiguous is no doubt desirable,” it is permissible only “so long as it ‘creates no interference by... (one) department with the power of... (another) department.’” *Id*. at 642 (quoting *Opinion of the Justices*, 208 Mass. 610, 613 (1911)). Here, allocation of a subset of custody determinations to an administrative agency of another state interferes with judicial power.

This encroachment on judicial power would be mitigated if courts could override the ICPC requirements on a case-by-case basis. A judicial override is necessary to avoid a constitutional violation, where a legislative act transfers to an administrative agency a power that courts have held under the established separation of powers scheme. *See* *Maas v. Olive*, 992 So.2d 196, 202-203 (Fla. 2008) (finding that while a statute setting compensation caps for court-appointed attorneys was not unconstitutional on its face, judges must be able to award higher compensation, as needed, to avoid unconstitutional infringement of the court’s inherent authority to ensure adequate representation). Courts must therefore be able to override an agency decision in order to avoid constitutional infirmities.

With regard to the ICPC, this means the Court must be empowered to make discretionary decisions to bypass the home study requirement of the Compact in cases like Father’s. This ability is lacking under the ICPC, thus creating a constitutional infirmity.

**8. Given these serious constitutional issues, the ICPC cannot apply to parents.**

When reasonably possible, the court has a duty to interpret statutes in a way that avoids constitutional questions. *E.g.*, *Beeler v. Downey*, 387 Mass. 609, 613 (1982); *Harris v. U.S.*, 536 U.S. 545, 555 (2002). As shown above, application of the ICPC to parents conflicts with parents’ fundamental due process rights, equal protections rights, right to travel, and right of access to courts. It also violates the separation of powers between the branches of government. This Court must therefore interpret the ICPC to avoid these constitutional problems. It can do so by looking at the plain language and plain meaning of the ICPC, which limits its scope to placements for foster care or preliminary to adoption. Custody order to out-of-state parents are not, and should not be, covered. This construction is reasonable and avoids the constitutional problems discussed above.

**CONCLUSION**

 For the foregoing reasons, the ICPC and its home study requirement do not apply to Father, and this Court can order custody to him directly and immediately.

**WHEREFORE**, Father respectfully requests that this Court grant him:

(a)  custody immediately without application of the ICPC and without the requirement of a home study; and

(b)  such other and further relief as is just and proper under the circumstances.

DATED:

Respectfully Submitted,

Certificate of Service and Notice of Hearing

I, , hereby certify that I caused the within Motion for Immediate Custody to Father to be served upon counsel for the parties in this matter via email with permission.

I further notify the parties that this matter has been marked for hearing on \_\_\_\_\_\_\_\_\_\_\_at \_\_\_\_\_\_\_\_\_\_\_ in the \_\_\_\_\_\_\_\_\_\_\_Juvenile Court.

Signed under the pains and penalties of perjury on this\_\_\_\_\_day of \_\_\_\_\_\_\_\_\_\_\_, 2021.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. Although it is conceivable that an ICPC home study by Florida DCF could be completed sooner than a few months, it is highly unlikely, especially during the COVID pandemic. The American Public Human Services Association (APHSA), which acts as Secretariat to the Association of the Administrators of the ICPC, acknowledges delays. According to that organization’s ICPC FAQ page, *available at* <https://aphsa.org/AAICPC/AAICPC/icpc_faq_2.aspx> (last accessed Jan. 29, 2020), while the federal requirement is 60 days for processing of a home study request, it may take longer. Obviously, the delays may be considerable because of the COVID pandemic. [↑](#footnote-ref-1)
2. There is no established bright line as to the permissible duration of a deprivation prior to a “due process” hearing. State legislatures have weighed the interests of parents and states, and have enacted statutes setting time limits for post-removal hearings, typically within 24 to 96 hours of a child’s removal. *See* *Matter of Jordan*, 616 N.E.2d 388, 392 (Ind. App. 1993) (citing sample states’ requirements for timeliness of post-removal hearings). Massachusetts requires hearings within 72 hours. G.L. c.119, § 24. *In re Custody of Lori*, 444 Mass. 316, 321 (2005), acknowledged that parents and children face substantive due process deprivations when children are removed from their parents. Therefore, they must have the procedural protection of 72-hour hearings, regardless of which court is hearing the case. *Id.* at 322.

   The Nebraska Supreme Court was faced with a case in which 14 days elapsed between the time a child was taken into state protective custody and a hearing was held. The court held that while the 14-day period did not violate due process, it went to the “brink of unreasonableness.” *In re Interest of R.G.*, 470 N.W.2d 780, 792 (Neb. 1991), *overruled on other grounds*, 582 N.W.2d 350, 355 (Neb. 1998). If a 14-day delay is at the brink of unreasonableness, a months-long delay is well into the realm of unreasonableness. [↑](#footnote-ref-2)