No. _____

In The

Supreme Court of the United States

KYLE CONKLIN,

Petitioner,

v.

THE STATE OF IOWA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Iowa Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Quilloin v. Walcott*, this Court stated:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." 434 U.S. 246, 255 (1978).

In *Stanley v. Illinois*, this Court stated that parental "competence and care" are the "determinative issues" concerning parental unfitness. 405 U.S. 645, 657 (1972).

Kyle Conklin raised his five children their whole lives. On June 28, 2010 Iowa removed Kyle's four sons from his Nebraska home. Kyle's daughter was left in his custody and care.

On October 15, 2010, Iowa issued an illegal and unconstitutional "No Bail" warrant for Kyle's arrest on a misdemeanor complaint. The "No Bail" warrant limited father/son contact. In 2011, Iowa Courts denied Kyle's request for custody of his sons, determining that "the children cannot be placed in his care" because Iowa Courts "cannot override" an ICPC social worker's home study. Iowa's refusal to place custody with Kyle further limited father/son contact.

QUESTION PRESENTED – Continued

On August 22, 2012, the Iowa Court of Appeals upheld the termination of Kyle's parental rights on a single ground: lack of significant and meaningful father/son contact.

Iowa placed Kyle's four sons in four separate foster homes. Kyle's daughter has, at all times, remained in Kyle's custody in Nebraska, where she has flourished under his care. The question presented is:

> Did Iowa break up Kyle's natural family without a judicial determination of parental unfitness, as measured by "competence and care," offending the Due Process Clause?

LIST OF PARTIES

The parties to the proceeding are:

Kyle Conklin, father, appellant below, and Petitioner here.

The State of Iowa, appellee below, and Respondent here.

Brandonlyn Nunley, mother, appellant below, and Respondent here.

Tisha Halverson the children's guardian ad litem below, and Respondent here.

No corporations are involved in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Iowa Court of Appeals is not reported and is included in the Appendix. (Appendix ["App."] 1-15). The order of the Supreme Court of Iowa summarily denying review is unpublished and is included in the Appendix. (App. 60-61). The Juvenile Court's Order Terminating Parental Rights is not reported and is included in the Appendix. (App. 16-37).

JURISDICTION

The date on which the highest state court decided the father's case was August 22, 2012. A copy of the decision appears at App. 1-15.

The father's application for further review was denied on September 19, 2012.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. XIV, § 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Iowa Const. art. I, § 12:

> . . . All persons shall, before conviction, be bailable, by sufficient sureties, except for capital offences where the proof is evident, or the presumption great.

Iowa Const. art. I, § 17:

> Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.

Iowa Code § 232.116(1)(e):

> . . . the court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:
>
> * * *
>
> e. The court finds that all of the following have occurred:
>
> (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
>
> (2) The child has been removed from the physical custody of the child's parents for a period of at least six consecutive months.
>
> (3) There is clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so. For the purposes of this subparagraph, "significant and meaningful contact" includes but is not limited to the affirmative assumption by the parents of the duties encompassed by the role of being a parent. This

> affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child's life.

Iowa Code § 232.158(3)(d):

> The interstate compact on the placement of children is hereby enacted into law and entered into with all other jurisdictions legally joining therein in form substantially as follows:
>
> 3. Article III – Conditions for placement.
>
> * * *
>
> d. The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

Iowa Code § 804.3:

> If the offense stated in the warrant be bailable, the magistrate issuing it must make an endorsement thereon as follows: 'Let the defendant, when arrested, be (admitted

to bail in the sum of. . . . . dollars) or (stating other conditions of release).'

STATEMENT OF THE CASE

A. Kyle raises his children. Kyle raised and supported his four sons and one daughter, A.C., from birth until the spring of 2010 without state intervention or supervision. (Tr. v. IV 807, 813).[1] In spring 2010, Kyle's children lived with him in Wellfleet, Nebraska. Wellfleet is a rural town in western Nebraska with a population of about 50 people. (Tr. v. IV 869). Kyle and his children lived in a nice home with a large, fenced-in yard. (Tr. v. IV 868). The property opened up to a "huge field and hills and trees, and there's not trees for a good half mile or so, but it just opens off to nothing." (Tr. v. IV 869). The children had a pet German Shepherd and played at the two playgrounds in town. *Id*.

The town preacher gave the Conklin children full access to the local church camp. (Tr. v. IV 870). The home was full of games and activities. (Tr. v. IV 865). With Kyle, the children would "go out and play basketball or we would run around, throw balls, walk down to the lake, go sledding when there was snow."

[1] References are to the record below in this case. "Tr." refers to the trial transcript. "v." refers to the trial transcript volume, I-V. "Ex." refers to the trial exhibits.

(Tr. v. IV 866). The children all enjoyed the lake at the edge of town. (Tr. v. IV 870).

In the spring of 2010, Kyle and the children's mother, Brandonlyn, separated amicably on a brief trial basis. (Tr. v. IV 827). Brandonlyn took all of the children, except A.C., with her to briefly stay with relatives in Iowa. (Tr. v. IV 827). Brandonlyn suffered a childhood accident, and as a result has a general cognitive ability within the borderline range of intellectual functioning. (App. 4). After a brief, troubled stay with her relatives, Brandonlyn took her sons to a women's shelter, but was asked to leave because only abused women could stay. (Tr. v. III 670, 675).

B. Iowa removes Kyle's sons, not Kyle's daughter. Later that same spring, Brandonlyn and her sons became involved with the Iowa Department of Human Services [DHS] over supervision issues. Brandonlyn and her sons returned to Kyle's home in Wellfleet. On June 28, 2010, the Iowa Juvenile Court removed Kyle's sons from his house by Ex Parte Order. With guns drawn, Nebraska officials handcuffed Kyle and removed his sons. (Ex. 209, Tr. v. IV 817). The Nebraska social worker who attended the gunpoint removal was "laughing and carrying on like it was a day at the circus." (Tr. v. IV 817). Kyle, in handcuffs, told the social worker her behavior was inappropriate. (*Id*.). Nebraska sent the boys back to Iowa. Kyle's daughter, A.C., was left in his care, where she has flourished. (Tr. v. IV 806-07).

C. The "No Bail" arrest warrant. On October 15, 2010, Kyle was charged by State of Iowa criminal complaints with Tampering with a Witness (Iowa Code § 720.4) and Harassment (Iowa Code § 708.7(4)), two misdemeanor charges. (Ex. 211). The charges stemmed from Kyle leaving three telephone messages for Brandonlyn's sister in Iowa who had been involved in the removal of Kyle's sons. (Ex. 3). The arrest warrant issued on the complaints provided for "No Bail until seen by Magistrate." (Ex. 211). From October 2010 until January 9, 2012, Kyle made numerous unsuccessful efforts to have a bail amount set. (Tr. v. IV 839-41).

D. The ICPC social worker denies Kyle's home study. At all times, Iowa took the position that Kyle must have a positive Interstate Compact on the Placement of Children [ICPC] home study in order to have his sons placed in his care. Unfortunately for Kyle, the ICPC social worker assigned to do the home study was the sister of the Nebraska social worker that had been "laughing and carrying on" at the gunpoint removal of his sons. (Tr. v. IV 817).

An ICPC home study required, "at a minimum, . . . a face to face visit with the non-custodial parent at his home." (Ex. 202). On January 3, 2011, the ICPC social worker, however, summarily denied Kyle's home study without a visit to Kyle's home, personal interview, or interview of Kyle's daughter. (Ex. 209). Even though the ICPC worker asked for reference letters from Kyle's community and relatives, she did not wait for the reference letters to be submitted

before denying the home study. (Tr. v. IV 817-18). Most importantly, the ICPC home study did not explain why Kyle was fit to parent his daughter but not his sons. (Ex. 209).

E. Iowa Courts decide they "cannot override" the ICPC social worker. On February 24, 2011, Kyle sought custody of his sons by filing a motion to modify with the Juvenile Court, pointing out that the home study was done without a home visit and that his daughter was flourishing in his care. On June 14, 2011, the Juvenile Court concluded that it "cannot override" the ICPC home study. (App. 54). On September 8, 2011, the Iowa Court of Appeals agreed with the Juvenile Court, concluding that because the ICPC social worker denied Kyle Conklin's home study, "the children cannot be placed in his care," citing the ICPC, Iowa Code § 232.158(3)(d). (App. 47).

F. Bail set, the termination proceeding begins. On January 9, 2012, bail was set by agreement with the County Attorney on Kyle's misdemeanor charges. (Tr. v. IV 841; Tr. v. V 965). The next morning, the Juvenile Court commenced the termination of parental rights proceeding. (App. 16).

G. Kyle's daughter flourishes in his care. The termination proceeding evidence indicated that Kyle's daughter was flourishing in his care without state intervention. For instance, just before the termination hearing, A.C. "received a Big Red Star award from Governor Heineman in Nebraska for

excellence in leadership in junior high, . . . received awards for her musical ability and her singing." (Tr. v. IV 806-07). She was active in her church's Bethel Bible Camp. (*Id*.). She set up sunday schools for new children coming into the town. (*Id*.). She participated in Future Business Leaders of America and Quiz Club. (*Id*.). At the time of the termination hearing, Kyle's daughter was an eighth-grade honor student. *(Id.*, Ex. 201).

H. The termination based on lack of significant and meaningful father/son contact. The Juvenile Court appeared favorably impressed by Kyle's competence to parent, finding that Kyle:

> may have the ability to safely parent all of his children . . . it appears that a placement of the four boys in Kyle's home could be successful. . . . Further, Kyle has raised A.C. without involvement by the Nebraska Department of Health and Human Services, and A.C. is doing very well both in school and in the community. (App. 22-23).

Nevertheless, the Juvenile Court terminated Kyle's parental rights citing a lack of significant and meaningful father/son contact. (App. 28).

Kyle appealed the termination of his parental rights. (App. 1). On August 22, 2012, the Iowa Court of Appeals affirmed the termination on a single ground, finding Kyle "failed to maintain significant and meaningful contact with his children for the

previous six consecutive months prior to the termination proceeding." (App. 11).

I. Kyle's sons placed in four different foster homes. Kyle's four sons were placed in four separate foster homes following termination of parental rights. (App. 23).

J. Preservation of error. On the first day of the termination proceeding, January 10, 2012, Kyle filed his Memorandum of Authorities, stating:

> The authors' of the Interstate Compact on the Placement of Children "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. The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." *McComb v. Wambaugh*, 934 F.2d 474, 481 (3d Cir. 1991) (internal citations omitted).

Kyle's fitness to parent was the central theme of Kyle's case and closing argument. Examples include, but are not limited to:

- I think Kyle, now that he's been here, is the best exhibit I could possibly have to show that he's . . . got his kids' best interests at heart. He's able to demonstrate knowledge about not only his children individually, but parenting as a

whole. He's displayed knowledge of their individual tendencies. And I think he's demonstrated that he's a good parent on the stand. The next best exhibit, which we didn't get to present, was [Kyle's daughter A.C.]. And she's doing great. And she's in his care, and she's never been removed. Apparently, they . . . left her there during the removal and thought that was fine. (Tr. v. V 1024).

- There's a lack of evidence really anything inappropriate about Kyle Conklin. I sat here quiet for the better part of four or five days mostly because I would ask the witnesses if they had ever heard – or if they had ever met Kyle Conklin or worked with Kyle Conklin, and most of them would say, – they didn't know anything about him. They didn't know anything about his home. They still don't know anything about his home . . . Certainly, no one has come in and said Kyle's home is inappropriate other than a home study where they didn't go to his home. (*Id*. at 1029).

Kyle stated in his Petition on Appeal:[2]

- Amendments 14 and 9 to the United States Constitution. Unfitness/liberty interest: *Santosky v. Kramer*, 455 U.S. 745 (1982); *Quilloin v. Walcott*, 434 U.S. 246 (1978).[3]
- Substantive and Procedural Due Process: A mother's or father's interest in the integrity of his or her family unit is protected by Due Process. *Alsager v. District Court of Polk County*, 406 F.Supp. 10 (S.D. Iowa 1975); *Lassiter v. Department of Social Servs*., 452 U.S. 18 (1981); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *In re T.R.*, 460 N.W.2d 873 (Iowa App. 1990).
- Ordinarily, implicit in finding evidence to support termination on any of the

[2] The Petition on Appeal, Iowa's vehicle for parents to appeal termination of parental rights, employs expedited procedures (15 days to file), is limited in content (15 page limit) and directs the appellant to raise issues for appeal rather than arguing issues in a full appellate brief. *In re J.A.D.-F.*, 776 N.W.2d 879 (Iowa App. 1999). Iowa's de novo review requires the appellate court "to review the facts as well as the law and adjudicate rights anew on those propositions properly preserved and presented to us." *Id*. "[W]hile the appellate procedure under the . . . rules is streamlined, the reviewing court's ability to thoroughly appraise the legality of the termination is not compromised." *Id.*

[3] Iowa Rule of Appellate Procedure 6.201(1)(d) provides: "Contents of petition. The petition on appeal shall substantially comply with form 5 in rule 6.1401."

statutory grounds in 232.116(1) is a finding the parent, by conduct, has forfeited the constitutionally-protected interest in parenting a child. In this case, a finding that Kyle is responsible for the lack of father/son contact is not implicit in the finding that significant and meaningful contact did not occur. *In re Chad*, 318 N.W.2d 213, 219 (Iowa 1982), citing *Santosky*.

- Unfitness. Kyle is a fit parent who was denied custody in violation of his rights to Due Process and right to parent children. *See* Sankaran, 80-83. Kyle is raising A.C. well without state intervention. Kyle had raised his sons well in Nebraska and Colorado, without state intervention.
- The termination of Kyle's parental rights violated Kyle's right to parent children and his right to Due Process of law because Kyle was prevented from participating in visits and services and because termination occurred without an unfit parent finding.

Kyle requested full briefing, which was not granted.

With respect to Kyle's due process rights, the Iowa Court of Appeals stated that "the father asserts termination of parental rights without an unfit parent finding violates due process . . . We find no due process violation." (App. 11).

Kyle filed a Petition for Further Review in the Iowa Supreme Court, stating:

* * *

> 2. State conduct, not parental conduct, kept Kyle from having custody of his sons, violating Kyle's Due Process rights and his liberty interest in parenting his children.
>
> a. Due Process and Parental Liberty Interest: State Conduct v. Parental Conduct. Kyle's sons should have lived with him in Nebraska from the start of the Juvenile Court proceeding. Kyle has always been a fit parent. The Juvenile Court seemed to agree that Kyle is a fit parent. . . .
>
> A termination of parental rights based upon the State's conduct, rather than the unfitness of the parent violates Due Process. *Santosky v. Kramer*, 455 U.S. 745 (1982); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *In re Lewis*, 257 N.W.2d 505, 510 (Iowa 1977); V. Sankaran, "Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the ICPC," 25 Yale L. & Policy Rev. 63 (2006).

Kyle again requested full briefing, which was not granted. On September 19, 2012, the Iowa Supreme Court summarily denied review. (App. 60).

REASONS FOR GRANTING THE PETITION

Courts across the country are divided on the important recurring issue of whether the ICPC applies to a placement with a natural out-of-state parent. *See In re Dependency of DF-M*, 157 Wash. App. 179, 189, 236 P.3d 961, 965 (2010) (summarizing national split in authority); *infra*, pp. 34-36. As a result, fit parents throughout the country are regularly denied custody of their children. V. Sankaran, "Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the ICPC," 25 Yale L. & Policy Rev. 63, 66 (2006). This Court would resolve the split in authority throughout the United States by deciding the overarching issue that this case presents, namely, whether Iowa broke up Kyle's natural family without a judicial determination of parental unfitness, as measured by competence and care, offending the Due Process Clause.

This Court's resolution of the overarching issue would make it clear to courts across the country that any break up of a natural family, whether accomplished by termination statutes or the ICPC, must include a judicial determination that the parent seeking custody is unfit. Specifically, this Court should make it clear that parental unfitness must be measured by "the determinative issues of competence and care." *Stanley v. Illinois*, 405 U.S. 645, 657 (1972).

Finally, Iowa has decided the important federal question of whether a natural family can be broken

up without an unfit parent determination in a way that conflicts with relevant decisions of this Court. This Court has indicated that "competence and care" are "the determinative issues" in an unfit parent determination. *Id.* The Iowa Court of Appeals did not examine Kyle's parental competence and ability to care for his children before terminating his parental rights.

I. IOWA BROKE UP KYLE'S NATURAL FAMILY WITHOUT A JUDICIAL DETERMINATION OF PARENTAL UNFITNESS, AS MEASURED BY "COMPETENCE AND CARE," OFFENDING THE DUE PROCESS CLAUSE.

A father's fundamental liberty interest in the integrity of his family unit is protected by the Due Process Clause of the Fourteenth Amendment. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 25 (1981); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Integrity of the family unit has also found protection in the Ninth Amendment. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J., concurring). In *Santosky v. Kramer*, this Court determined that

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Even when blood relationships are strained, parents retain a vital interest in

> preventing the irrevocable destruction of their family life . . . 455 U.S. 745, 753 (1982).

In *Quilloin v. Walcott*, this Court stated:

> We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' 434 U.S. 246, 255 (1978).

Concerning the necessity of an unfit parent determination, this Court stated that "[v]ictory by the State not only makes termination possible; it entails a **judicial** determination that the parents are unfit to raise their own children." *Santosky* at 760 (emphasis added).

In *Stanley v. Illinois*, this Court explained the concept of parental unfitness:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses **the determinative issues of competence and care**, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. 405 U.S. 645, 657 (1972) (emphasis added).

A. Parental competence and ability to care for children are the determinative issues in an unfit parent determination.

Because Kyle had a protected liberty interest in the integrity of his natural family, due process demands an unfit parent determination prior to termination of his parental rights. Iowa undoubtedly has an interest in protecting the health, safety and welfare of children within its borders. *Santosky* at 652; *In re T.R.*, 483 N.W.2d 334, 337 (Iowa App. 1992). In *Stanley,* this Court explained why competence and care are the determinative issues in the concept of parental unfitness:

> What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family. *Stanley* at 657.

To paraphrase this Court's reasoning in *Stanley*, what is Iowa's interest in separating Kyle's sons from their father without a determination that Kyle cannot provide for the health, safety and welfare of his sons? *Stanley* at 652-53. Iowa registers no gain towards its declared goals when it separates Kyle's sons from the

custody of their fit father. Indeed, if Kyle can protect the health, safety and welfare of his children, Iowa spites its own articulated goals when it needlessly separates Kyle from his family.

In *Stanley*, this court stated that the determinative issues in an unfit parent determination are parental "competence and care." *Id.* at 657. Iowa did not consider the determinative issues of Kyle's parental competence and ability to care for children before terminating his parental rights, violating Kyle's due process rights.

Without an unfit parent determination based on competence and care, Kyle is left with an absurd result. Kyle competently parented his sons for most of their lives without state intervention or supervision until Iowa intervened. Kyle's daughter was thriving in his care even while Iowa refused to return Kyle's sons to his custody. *See supra,* pp. 8-9, ¶ G. Despite Kyle's parental competence, Iowa terminated his parental rights to his sons while leaving his daughter in his care. This absurd result would have been avoided had Iowa engaged in an unfit parent determination based on competence and care.

Iowa's termination statute is unconstitutional as applied to Kyle. The statute does not necessarily take into account the determinative issues of unfitness, parental competence and ability to care for children. Iowa's termination statute in this case only requires proof that "the parents have not maintained significant and meaningful contact with the child during

the previous six consecutive months. . . ." Iowa Code § 232.116(1)(e). To again paraphrase this Court in *Stanley*, by use of this proceeding, Iowa, on showing that six months had passed without significant and meaningful father/son contact, need not prove "unfitness in fact," because it is presumed at law. *Cf. Stanley* at 650. Iowa ended its inquiry at satisfaction of the statutory criteria for termination. Iowa did not examine Kyle's fitness to parent as measured by parental competence and his ability to care for his children.

To yet again paraphrase this Court's reasoning in *Stanley*: It may be that most fathers who have not had significant and meaningful contact with their children for six consecutive months are unsuitable and neglectful parents. But Kyle is not in this category; Kyle is wholly suited to have custody of his children. *Cf. Stanley* at 654. Iowa refused to give Kyle custody of his sons despite his efforts, Kyle did not neglect his sons. State conduct, not parental conduct, kept Kyle from contact with his children for 14 months. The Juvenile Court found no danger in returning custody to Kyle. Iowa's interests would be furthered by returning custody to Kyle.

B. Iowa did not determine Kyle was an incompetent parent with an inability to care for his sons when it terminated his parental rights based on lack of father/son contact.

The Juvenile Court seemed to determine Kyle was a fit parent based on competence and care. The Juvenile Court examined Kyle's parental competence and ability to care for his children. It appeared the Juvenile Court was favorably impressed with Kyle's parenting competence and ability to care for his children. (App. 22-23). It seems that while the Juvenile Court did not agree with the ICPC social worker's conclusions about Kyle's fitness to parent, it felt bound by the 2011 decision of the Iowa Court of Appeals indicating the ICPC prohibited placement with Kyle without a positive ICPC home study. *Id*. The Juvenile Court determined that:

> Based upon the evidence presented at the termination of parental rights hearing, it appears that Kyle may have the ability to safely parent all of his children, although he would need some supportive services at least initially. During the supervised visits that have occurred since the no-bond warrant issue was resolved, the visitation supervisor reported that Kyle was more proactive in supervising the boys than Brandonlyn and that the visits went well. Further, Kyle has raised A.C. without involvement by the Nebraska Department of Health and Human Services, and A.C. is doing very well both in school and

> in the community. Certainly, it would be a substantial change for Kyle to go from a household of two to a household of six, but with supportive services in place to assist with the transition, it appears that a placement of the four boys in Kyle's home could be successful. **However, a home study done by the Nebraska Department of Health and Human Services on Kyle Conklin's home in Wellfleet, Nebraska, was denied, and, therefore [Kyle's sons] cannot be returned to his custody without violating the Interstate Compact on the Placement of Children**. (App. 22-23) (emphasis added).

The Iowa Court of Appeals did not make an unfit parent determination based on competence and care. Upholding the termination, the Iowa Court of Appeals did not examine Kyle's competence to parent or ability to care for his sons. The Iowa Court of Appeals did not disagree with the Juvenile Court's apparent conclusion that Kyle was competent to care for his children.

The Iowa Court of Appeals mentioned that Kyle's daughter remained in his custody. (App. 2). The Iowa Court of Appeals did not, however, examine whether Kyle was competently parenting his daughter. The Court of Appeals also did not explain how Kyle was fit to parent his daughter, but not his sons. The Iowa Court of Appeals did not discuss how placement with Kyle would be contrary to his sons' health, safety, or welfare. The Iowa Court of Appeals did not even

mention the fact that Kyle had competently parented his sons for the majority of their lives until Iowa intervened.

Lack of father/son contact does not necessarily take into account parental fitness. The Iowa Court of Appeals terminated parental rights based solely on a lack of father/son contact. (App. 11). In this case, termination of parental rights based solely on the lack of father/son contact does not take into account the determinative issues of Kyle's parental competence and care, offending the Due Process Clause. Iowa's termination statute is unconstitutional as applied to Kyle.

Kyle does not dispute that there was a lack significant and meaningful father/son contact. In this case, however, the lack of father/son contact does not establish that Kyle is an incompetent parent without the ability to care for his sons. The termination of Kyle's parental rights was based on six months having passed without significant and meaningful father/son contact. (*Id*.) Due process demands more than counting months that father/son contact and service participation did not occur. Due process demands a determination of Kyle's fitness to parent as measured by parental competence and ability to care for his sons.

Kyle's parental rights were terminated for lack of father/son contact. The lack of father/son contact was not caused by waiting for Kyle to become a fit parent. Instead, the lack of father/son contact in this case

was caused by Iowa's refusal to give Kyle his sons back without a positive ICPC home study. The lack of father/son contact was also caused by Iowa's illegal and unconstitutional "No Bail" warrant. Both the termination statute and the ICPC should have been applied in a fashion which focused on Kyle's parental competence and ability to care for his sons.

The "No Bail" warrant limited father/son contact despite Kyle's parental competence and ability to care for his sons. On October 15, 2010, Iowa issued an arrest warrant for Kyle providing for "No Bail until seen by Magistrate." (Ex. 211). Iowa Code § 804.3 provides that a Magistrate issuing an arrest warrant for a bailable offense must make an endorsement thereon specifying the dollar amount of bail or stating other conditions of release.

The "No Bail" arrest warrant did not set a dollar amount for bail or state other conditions of release. The warrant absolutely precluded Kyle from accessing a surety. The "No Bail" warrant violated Iowa Code § 804.3 and the Eighth Amendment's prohibition against excessive bail. *See also* Iowa Const. art. I, § 12 and § 17.

Excessive terms. To Kyle, an American citizen, the excessive nature of the "No Bail" warrant was daunting:

> Q: Have you ever been familiar with a no-bond warrant for misdemeanor charges?

> A: No. I've known of people that committed murders, like mass murders, that had a no-bond hold. But other than that, you know, I don't know of anybody that's ever had one or that I've even heard of. (Tr. v. V 987).

Kyle correctly assessed that the State was treating him more like a murderer than a misdemeanor defendant. Kyle was justifiably scared that the length and conditions of his pretrial confinement might resemble a murderer's pretrial confinement.

The risks for Kyle to come to Iowa and submit to the "No Bail" warrant were excessive. Kyle testified that "I was very leery about how long I could be held without bond, how long it could be, possibly even months." (Tr. v. V 966).

> My understanding was that there was no bond, that I would have to . . . come up here and be arrested and sit in jail for an unknown amount of time, and then not . . . having any idea what the bond was going to be, whether it would be astronomical and I wouldn't be able to post it . . . That was very, very difficult because of the fact that I have [my daughter] to take care of, and I couldn't just take off. (Tr. v. IV 836).

Under the terms of the "No Bail" warrant Kyle could not know if he would be held indefinitely, if an indefinite jail stay would cost him his job, if bail would be set at all or how long to make arrangements for his daughter's care. (Tr. v. IV 836, v. V 917).

The United States constitutionally prohibits excessive bail and Iowa provides a limited right to access a surety specifically to ensure citizens are not subjected to the risks that Kyle faced. U.S. Const. amend. VIII; Iowa Code § 804.3. *See also* Iowa Const. art. 1, § 12 and § 17.

Excessive terms v. misdemeanor charge distinction. The Iowa Court of Appeals found that "the father's acts led to the October 2010 arrest warrant. The father failed to resolve the issue. . . ." (App. 10). Even if Kyle's actions caused the misdemeanor charges (ignoring the presumption of innocence for the sake of argument),[4] Kyle had no part in setting the illegal and unconstitutional terms of the "No Bail" warrant.

Kyle explained the importance of the distinction on cross-examination:

> Q. Minor trouble kept you away from your children for 20 months.
>
> A. It's a misdemeanor charge, which I do take very seriously. I know the consequences of it.
>
> Q. And the consequences was your boys were without their father . . . for 20 months.

[4] Kyle was never convicted of Tampering with a Witness for the three phone messages. On May 2, 2012, the Tampering with a Witness charge was dismissed. Kyle plead guilty to simple misdemeanor telephone harassment and was sentenced to a pay a $65 fine.

> A. But that doesn't – that has nothing to do with the fact that I had a no-hold bond on me, which you're not seeing. If – if that bond wouldn't have been there, if I would have been able to bond in and out, if they would have said, 'Hey, you come down here and pay this X amount of money and you can be out of jail,' simple as that, I would have been here. And you can run it through the ringer a hundred times and try to twist it and make it into something else that it's not, but that's the truth. If it wasn't for that issue, then I would have been here. I would have been here sitting in this court taking care of my problems.
>
> Q. If it wasn't for a misdemeanor charge, you would have been here. And I think you –
>
> A. If it wasn't for a no-bond hold, I would have been. (Tr. v. V 984).

The misdemeanor charges did not keep Kyle from Iowa and his sons. What kept Kyle from Iowa and his sons were the excessive terms of the "No Bail" warrant.

Kyle's numerous unsuccessful efforts to resolve the "No Bail" Warrant. Kyle's parental competence and ability to care for his sons are not diminished because he was unable to deal with a "No Bail" warrant despite his best efforts. Kyle submitted the affidavit of a criminal defense attorney with 37 years experience who stated: "addressing a 'no bond' warrant as an experienced criminal defense attorney

is a difficult task. . . . If I were a non-lawyer representing myself facing a 'no bond' warrant, it would be very difficult to address a 'no bond' warrant on my own behalf." (Ex. 215).

It is important to note that the Iowa Court of Appeals understated Kyle's efforts concerning the "No Bail" warrant. (App. 10). In fact, Kyle's efforts included all of the following:

- Kyle called Attorney George Wittgraf for help;
- Kyle called Attorney Shawna Ditsworth for help several times;
- Kyle submitted an application for court appointed counsel;
- Kyle had multiple conversations with the county clerk of court;
- Kyle attempted to call the magistrate judge;
- Kyle sent two letters "To Whom it May Concern" addressed to the courthouse asking that a bail amount be set. (Tr. v. IV 839-41).

Both the Iowa Court of Appeals and the Juvenile Court criticized Kyle for not resolving the "No Bail" warrant earlier. (App. 10, 22). Neither the Iowa Court of Appeals nor the Juvenile Court posited any additional steps Kyle could have taken to resolve the "No Bail" warrant. (*Id.*). Just because an experienced criminal defense attorney handled the "No Bail" warrant a

short time after being appointed does not mean Kyle ever had the ability to handle the "No Bail" warrant. (Tr. v. V 967). In any event, Kyle's inability to resolve a "No Bail" warrant does not diminish his parental competence or ability to care for his sons.

It is also important to note that Iowa failed to remedy its illegal and unconstitutional action. It was Iowa, not Kyle, that waited until January 9, 2012 to agree to set bail upon Kyle's appearance. (Tr. v. IV 865, 841).

> Q: All right. In January of 2012, then, [the "No Bail" condition] changes. What happened?
>
> A: Well, you were appointed . . . I know that you spoke with the district attorney. Some progress was made. And they agreed that if I came up here and turned myself in that a bond would be set. (*Id*.).

Kyle did not sit on his rights from October 2010 to January 2012. Kyle continually invited the appropriate Iowa authorities to fix its illegal "No Bail" warrant. (Tr. v. IV 839-41). Considering all of Kyle's efforts to resolve the "No Bail" warrant it cannot be said Kyle is an unfit parent because he sat on his rights.

Iowa's 2011 ICPC decisions limited father/son contact despite Kyle's parental competence and ability to care for his sons. The "No Bail" warrant limited father/son contact by limiting visits. The most significant limitation on father/son contact, however, was Iowa's refusal to return custody

of Kyle's sons in 2011. The 2011 decisions shaped the historical events that formed the basis for termination of Kyle's parental rights in 2012. *Santosky* at 763 ("Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.").

Iowa Courts decided in 2011 that Kyle's children "cannot be placed in his care," because the ICPC did not allow the placement. (App. 54, 47). Kyle invited Iowa to evaluate his parental fitness and return his sons. Iowa refused to make a judicial determination of Kyle's fitness to parent when it found that it "cannot override" an ICPC home study and as a result "the children cannot be placed in his care." (*Id*.). The lack of father/son contact caused by Iowa's 2011 decisions does not reflect on Kyle's parental competence.

To be clear, Kyle is not asking this court to review the 2011 decisions of the Iowa Courts. Those decisions are not subject to review. However, the 2011 Modification decisions had far reaching effects for the 2012 termination proceeding. In 2012, Kyle's parental rights were terminated based on the very lack of significant and meaningful father/son contact caused by Iowa's 2011 decisions denying Kyle custody of his sons. Iowa did not determine Kyle's parental fitness when it denied his 2011 request for custody. Terminating Kyle's rights in 2012, Iowa again failed to determine Kyle's parental fitness. The result is just what this Court has previously found unconstitutional:

Iowa broke up Kyle's natural family without a determination that Kyle is an unfit parent.

Kyle's 2011 Motion to Modify Custody. On February 24, 2011, Kyle sought custody of his sons by filing a Motion to Modify with the Juvenile Court, pointing out that his home study was done without a home visit, without a personal interview, and that he had custody of his daughter A.C., who was flourishing in his care. *See supra,* pp. 8-9, ¶ G. On June 14, 2011, the Juvenile Court concluded that it "cannot override" the ICPC home study, refusing to make a judicial determination of Kyle's parental fitness. (App. 54). On September 8, 2011, the Iowa Court of Appeals agreed with the Juvenile Court, concluding that because Nebraska denied Kyle's home study, "the children cannot be placed in his care," citing Iowa Code § 232.158(3)(d). (App. 47). The Court of Appeals and Juvenile Court's repeated refusals to place Kyle's sons in his care denied Kyle his best opportunity to have significant and meaningful contact with his sons.

The 2012 Termination of Parental Rights. Iowa had Kyle whipsawed when it came to father/son contact. Iowa's illegal and unconstitutional "No Bail" arrest warrant kept Kyle from visits with his sons in Iowa for 14 months. At the same time, Iowa's 2011 decisions that "the children cannot be placed in his care" because the ICPC prevented the placement kept Kyle's sons from living with him in Nebraska. (App. 54, 47). Both the "No Bail" warrant and Iowa's 2011 ICPC decisions kept Kyle from "significant

and meaningful" father/son contact. Iowa Code § 232.116(1)(e).

The termination proceeding became an exercise in counting months rather than evaluating parental competence and care. Iowa had already decided in 2011 that Kyle's sons "cannot be returned." (App. 54, 47). Upholding the termination of Kyle's parental rights in 2012, the Iowa Court of Appeals simply counted the number of months Kyle and his sons failed to have "face-to-face" contact. (App. 9). When Iowa's 2011 Modification decisions were coupled with Iowa's six month "significant and meaningful contact" termination statute, termination was a nearly inevitable result. *See* Sankaran at 66-67.

While counting months can be a factor in determining fitness to parent, it should not be the sole and determinative factor. As applied to Kyle, the termination statute made counting months the sole and determinative factor and ignored his fitness to parent. Iowa's 2011 Modification decisions were incapable of being overcome by proof of the most positive character. *Cf*. *Stanley* at 656.

Kyle was not suddenly made an incompetent parent after 15 years of competent parenting because he was unable to resolve an illegal and unconstitutional "No Bail" warrant without a lawyer's assistance. Similarly, Kyle was not suddenly made an incompetent parent because Iowa determined in 2011 that its Courts "cannot override" an ICPC home study. (App. 54).

It may be that most fathers who have not had significant and meaningful contact with their children for six consecutive months are unsuitable and neglectful parents. But Kyle is not in this category; Kyle is wholly suited to have custody of his children. *Cf. Stanley* at 654. Iowa prevented father/son contact for over 14 months. Iowa then based its termination of Kyle's parental rights on the lack of father/son contact Iowa had created. Because Iowa based the termination on lack of father/son contact and not on the determinative issues of parental competence and care, the termination statute is unconstitutional as applied to Kyle.

C. Judicial determination of Kyle's parental unfitness was necessary to satisfy due process.

This Court had indicated that a judicial determination that the parents are unfit to raise their own children is entailed with the termination of parental rights. *Santosky* at 760. The Iowa Court of Appeals did cite the fact that "Nebraska authorities denied the home study for possible placement of the children with the father pursuant to the ICPC." (App. 5). Iowa could not have relied solely on the ICPC home study to determine Kyle was an unfit parent. The ICPC home study is not a judicial determination of unfitness to parent.

The ICPC home study, conducted by an ICPC social worker without a home visit, interview with

Kyle's daughter or explanation why Kyle is fit to parent his daughter but not his sons is not sufficient to satisfy Kyle's due process rights. The ICPC home study did not explain the fact that Kyle's daughter was flourishing in his care. *See supra,* pp. 8-9, ¶ G.

When, in 2011, Iowa Courts decided they "cannot override" the decision of an ICPC social worker, the Iowa Courts made an ICPC social worker the "ultimate arbiter" of both placement and parental rights. (App. 54, 47). Sankaran at 66. Kyle was entitled to a judicial determination of his parental fitness, as measured by competence and care. The ICPC home study was not a judicial determination of Kyle's fitness to parent. Iowa Courts failed to make a judicial determination about Kyle's fitness to parent in either 2011 or 2012, before breaking up his family, offending due process.

D. This Court would resolve the conflicting case law across the country concerning ICPC applicability to out-of-state parents by deciding the overarching issue that this case presents, namely, whether Iowa broke up Kyle's natural family without a judicial determination of parental unfitness, as measured by "competence and care."

Conflicting State and Federal case law. Courts across the country are divided on whether the ICPC applies to placements with an out-of-state

parent. In 2010, the Washington State Court of Appeals summarized the conflicting decisions:

> A slight majority of courts that have addressed the issue have decided that the ICPC applies to a placement with a parent so long as the child remains subject to the jurisdiction of the Juvenile Court. *See Green v. Div. of Family Servs.*, 864 A.2d 921 (Del. Supr. 2004); *H.P. v. Dep't of Children and Families*, 838 So. 2d 583 (Fla. App. 2003); *Arizona Dep't of Economic Sec. v. Leonardo*, 200 Ariz. 74, 22 P.3d 513 (2001); *Adoption of Warren*, 44 Mass. App. Ct. 620, 693 N.E.2d 1021 (1998). Other courts have so assumed, without discussion. *See*, e.g., *K.D.G.L.B.P. v. Hinds County Dep't of Human Servs.*, 771 So. 2d 907 (Miss. 2000); *D.S.S. v. Clay County Dep't. of Human Res.*, 755 So. 2d 584 (Ala. Civ. App. 1999); *State ex rel. Juvenile Dep't of Clackamas County v. Smith*, 107 Or. App. 129, 811 P.2d 145 (1991); *In re J.H.*, 156 Vt. 66, 587 A.2d 1009 (1991).
>
> The only federal court to have addressed the issue held that the ICPC does not apply to parental placements. *See McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991). The Third Circuit is joined by several state courts. *See In re Alexis O.*, 157 N.H. 781, 959 A.2d 176 (2008); *Arkansas Dep't of Human Servs. v. Huff*, 347 Ark. 553, 65 S.W.3d 880 (2002); *State of New Jersey Div. of Youth & Family Servs. v. K.F.*, 353 N.J. Super. 623, 803 A.2d 721 (2002); *Tara S. v. Superior Court of San Diego County*, 13 Cal. App. 4th

1834, 17 Cal. Rptr. 2d 315 (1993). *In re Dependency of DF-M*, 157 Wash.App. 179, 236 P.3d 961 at n.27 (2010).

Washington State decided the ICPC does not apply to placement with an out-of-state parent. *In re DF-M* at 1, 12-14. Addressing a fact pattern similar to the facts of this case, Michigan has cited favorably to both *McComb* and *In re DF-M*. *See In the Matter of A.X.W.,* No. 299622*,* 2011 WL No. 2119626 (Mich. App. May 26, 2011). Florida's position on the issue has been questioned by other Courts. *In re C.B.*, 116 Cal. Rptr. 3d 294, at n.1 (Cal. App. 2010) (stating "Florida can't seem to make up its mind.").

Iowa's "Split in Authority." Washington State did not list Iowa as one of the states that had addressed the ICPC issue. The Iowa Court of Appeals had, however, addressed the issue in 2008. Before the termination hearing, Kyle pointed out that the Iowa Court of Appeals ruled in 2008 that the ICPC did not apply to out-of-state relatives. *In re M.U.-C.*, No. 08-0086, 2008 WL 2201210 at 3 (Iowa App. May 29, 2008). Kyle pointed out that Iowa's 2011 Modification decisions were in direct conflict with prior Iowa precedent. *Compare In re M.U.-C.* at 3 *with* App. 47.

Explaining why Kyle's sons could not be returned to him, the Juvenile Court tactfully identified a "split of authority" in Iowa on the issue of whether the ICPC requires a positive home study prior to placing a child with an out-of-state parent. (App. 31). Upholding

the termination, the Iowa Court of Appeals elected not to address Iowa's "split in authority." (App. 11-12).

The current application of the ICPC fails to comport with due process. The inconsistent application of the ICPC across the country results in fit parents like Kyle being denied custody on a regular basis. Sankaran at 66. One commentator has observed that "the current application of the ICPC fails to comport with due process by delegating the sole responsibility for making the placement decision to child welfare caseworkers, by denying parents the right to have an unfavorable decision reviewed by a court, and by delaying the entire process." Sankaran at 67. Overarching each of Professor Sankaran's criticisms is the risk that Kyle and all out-of-state parents face: that the ICPC home study requirement breaks up families without a judicial determination of parental unfitness. Each of Professor Sankaran's criticisms applied in this case, culminating in the termination of Kyle's parental rights.

Delegation of the placement decision to an ICPC social worker. It seems that while the Juvenile Court did not agree with the home study's conclusions about Kyle's fitness to parent, it felt helpless to review the ICPC social worker's home study denial. The Juvenile Court found that it "cannot override" the ICPC home study. On September 8, 2011, the Iowa Court of Appeals agreed with the Juvenile Court, concluding that because the Nebraska social worker denied Kyle Conklin's home study, "the children

cannot be placed in his care," citing the ICPC. (App. 54, 47).

Iowa Courts should have made a judicial determination of Kyle's competence to parent and ability to care for his children. In this case, the Iowa Courts improperly delegated that determination to an ICPC social worker. In so doing, Iowa made the ICPC social worker the "ultimate arbiter" of not just child placement, but eventually of parental rights. Sankaran at 67.

No Judicial Review. Similarly, the Iowa Courts' finding that they "cannot override" the ICPC social worker's decision deprived Kyle any right to have Nebraska's unfavorable home study reviewed by the court. Sankaran at 83. Iowa and Nebraska's "compact" statutes, although not identical, are similar in one regard: neither the Nebraska nor Iowa ICPC afford a parent the right to appeal a negative ICPC home study. *See generally* Neb. Code § 43-1103 and Iowa Code § 232.158. The ICPC home study itself included no instructions about appeal. (Ex. 209). The FAQ section of the Compact Administrators website reads:

> Question 11: If placement is denied, is there an appeal process?
>
> Answer: Currently, there is no formal nationwide process to appeal an ICPC denial. States vary as to what, if any, options exist to appeal a denial. For more information about appeal options in a specific state, please see

the State Page for that state. *See* http://icpc.aphsa.org/Home/faqs.asp#11.

Nebraska's "State Page" has no information about appealing an ICPC home study. *Id*. at Nebraska State Page. An appeal of the ICPC social worker's decision is not possible in Nebraska. When the Iowa Courts decided they did not have the power to override the ICPC social worker's home study with their own judicial determination of Kyle's fitness to parent, Kyle was left with no avenue to review the ICPC social worker's negative decision.

Delay. The ICPC home study requirement delayed the process of placing Kyle's sons with him for months. Sankaran at 84. Kyle should have had custody of his sons from the outset. If, on June 14, 2011 the Juvenile Court decided the case based on Kyle's parental competence and ability to care for his sons, rather than the ICPC, Kyle could have spent over six months with his sons demonstrating significant and meaningful contact before the 2012 termination. At no time did Iowa make a judicial determination that Kyle was an unfit parent. The ICPC home study requirement, however, delayed possible placement with Kyle for months, and eventually foreclosed the possibility entirely. From the time Kyle's sons were removed in June 2010 until the home study was complete in January 2011, Iowa's six month statutory termination period had run. Iowa Code § 232.116(1)(e).

The overarching issue. This Court would resolve the conflicting case law across the country by deciding the overarching issue that this case presents, namely, whether Iowa broke up Kyle's natural family without a judicial determination of parental unfitness, as measured by competence and care, offending the Due Process Clause.

This Court should make it clear that termination statutes and the ICPC must be applied in a fashion which does not break up a natural family without a parental unfitness determination. This Court should confirm that the determinative issues in any parental unfitness determination are parental competence and ability to care for children. This Court should make it clear that any unfit parent determination must be a judicial determination, not an ICPC social worker determination.

This Court should make it clear to courts across the country there is no statute or compact that courts cannot override when a fit parent's fundamental liberty interest in parenting children and due process rights are at stake. This Court should review this case to keep families all over the country, like Kyle's, from being broken up for no reason. Most importantly, this Court should review this case to put Kyle's sons and daughter back together in his competent care.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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