IN THE [INSERT COURT] COURT OF [INSERT JURISDICTION]

IN RE **[INSERT NAME]**	)	
	)	
Plaintiff,	)	
	)	Case No.
vs.	)	
	)	
[INSERT NAME],	)	
	)	
Defendant.	)	
	)	
	)	
	)	

TRIAL BRIEF IN SUPPORT OF DEFENDANT[1]

Plaintiff's Counsel
FIRM NAME
Firm Address
Firm telephone

Defendant's Counsel
Firm Name
Firm Address
Firm Telephone

1 This terminology may change depending on who is bringing the case and also whether the case is a custody matter or a neglect/abuse matter.

[This sample trial brief is intended to assist counsel representing immigrant victims of domestic violence, sexual assault and human trafficking as well as other immigrant mothers in a family court proceedings. It focuses on the intersection between family law (termination of parental right, child abuse and neglect proceedings and contested custody cases brought by the state or by the children's other parent against an immigrant parent. What follows is a sample trial brief written in the context of a termination of parental rights proceeding. This brief can be easily adapted for use in child abuse and neglect proceedings or child custody cases when similar issues are raised. We encourage you to add the facts of your case and local state family law and to use this brief as a tool to inform judges about the law that should be applied in cases of undocumented, detained and even deported immigrant parents]

I. INTRODUCTION

[Sample Introduction for termination of parental rights proceedings]

This Court seeks to terminate the parental rights of [CLIENT], a direct violation of well settled principles of [INSERT STATE OR JURISDICTION] family law and constitutional due process rights afforded to [CLIENT]. In seeking to terminate her rights, the Jasper County Circuit Court District would inappropriately have to determine that her son would be better off growing up with an American couple than with a natural parent who entered this country as an undocumented immigrant. As courts throughout the country have consistently recognized, immigration status cannot, and should not, serve as the basis to extinguish a parent's rights. But [CLIENT]'s immigration status appears to be the only basis—or at least one of the key bases—on which [the State or other parent] seeks termination of parental rights here. In addition, [CLIENT] has thus far been deprived of the due process rights to which she is entitled because, among other things, she was not properly informed of the proceedings or her rights in her native

language in a manner in which she could understand them. She therefore was unable to participate in the early hearings in this case. Accordingly, [INSERT FIRM NAME] submits this trial brief in support of Defendant [CLIENT] and urges this Court to decide in her favor and deny the State's request to terminate [CLIENT'S] parental rights and to work quickly to reunite her with her son.

II. STATEMENT OF THE CASE

[INSERT CASE FACTS HERE] Include the circumstances leading up to the [child abuse or neglect action, the Parental Termination case, or contested custody case] any due process rights of the detained parent that may have been violated, any relevant facts to the immigrant parents fitness as a parent and the best interests of the child, as relevant to the proceeding and under state law].

III. ARGUMENT

A. Fundamental Importance of the Parent Child Bond

[This section articulates these arguments based upon constitutional law and the laws of the State of Missouri. You may craft a similar argument using the law of the jurisdiction of this proceeding. We encourage you to consider including as persuasive authority rulings in similar matters from other state courts in addition to the court rulings in your jurisdiction. It is particularly important to do this when case law in your state is silent on any of the particular issues addressed in this sample brief.]

A parent has a fundamental, constitutional right to the care, custody and control of his of her child, absent a compelling state interest. *Santosky v. Kramer*, 455 U.S. 745, 747 (1982). This Court has characterized the parent child bond as "one of the oldest fundamental liberty interests." *In re KAW and KAW*, 133 S.W.3d 1, 12 (Mo. 2004).

Precisely because of the fundamental nature of the right to raise one's

biological children, courts have routinely admonished that great care be taken in proceedings seeking to terminate that right, and that adequate protections be afforded the parent whose parental rights are the subject of the proceeding:

> "The fundamental liberty interest of natural parents in raising their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State." *Santosky v. Kramer*, 455 U.S. at 753, 102 S.Ct. 1388; *In the Interest of M.D.R.*, 124 S.W.3d 469, 472 (Mo. Banc 2004). Those faced with forced dissolution of their parental rights have a more critical need for protections than do those resisting state intervention into ongoing family affairs. *Id.* The termination of parental rights has been characterized as tantamount to a "civil death penalty." *In re N.R.C.*, 94 S.W.3d 799, 811 (Tex. App. – Houston [14th Dist.] 2002); *In re Parental Rights as to K.D.L.*, 118 Nev. 737, 58 P.3d 181, 186 (2002). "It is a drastic intrusion into the sacred parent-child relationship." *In the Interest of P.C., B.M. and C.M.*, 62 S.W.3d at 603.

Id. See also Interest of K.T.K. v. Crawford County Juvenile Office, 229 S.W.3d 196, 200 (Mo. Ct. App. 2007). As this court and the appellate courts of Missouri have noted time and again, "[t]he termination of parental rights is an exercise of awesome power and strict and literal compliance with the statutory language is demanded." *In re Baby Girl W*, 728 S.W.3d 545, 547 (Mo. Ct. App. 1987). After the court determines that one of the statutory bases for termination is satisfied, it must then determine by a preponderance of the evidence that termination is in the best interest of the child. *Id.* at 601.

B. Statutory Grounds to Terminate Parental Rights

In determining whether to terminate parental rights, a court is bound by the grounds set forth in Missouri Rev. Stat. 211.447. "[T]he court must find that there exists clear, cogent and convincing evidence that one or more statutory grounds

for termination exist." *In the Interest of E.A.C.*, 253 S.W.3d 594, 599 (Mo. Ct. App. 2008). There are only six statutory grounds that provide a legitimate basis for termination of parental rights: (1) the child has been abandoned; (2) the child has been abused or neglected; (3) the child has been in the juvenile court system for a year; (4) the parent pleads or is found guilty of a sexual offense against any child in the family; (5) the child is a result of forcible rape; and (6) the parent is determined to be unfit. Mo. Rev. Stat. 211.447(5).

It appears that the sole basis for [The State's or Plaintiff's] abandonment allegation is [CLIENT]'s detention due to her immigration status. In fact, the *only* circumstances which led to [CLIENT]'s separation from her son are her status as an undocumented immigrant and her consequent arrest and detention for using false identifying papers to gain employment in the United States. However, neither [CLIENT]'s immigration status, nor her detention resulting from that status constitutes abandonment, and there is not other permissible basis for the State to exercise its "awesome" power to irrevocably deprive [CLIENT] of her son and him of his biological mother.

While various circumstances have been found to constitute abandonment, Missouri law makes clear that the parent's separation from the child must be intentional and willful, accompanied with an intent not to act as a parent to the child:

> Intention to abandon a child has been variously defined. It is the willful giving up of a child with the intention that the severance be of a permanent nature. It is the voluntary and intentional relinquishment of custody of the

> child with the intent to never again claim the rights or duties of a parent. Abandonment implies a willful positive act such as deserting the child.

In re Baby Girl W, 728 S.W.3d at 548 (citations omitted).

[The following paragraph would only be relevant for immigrant parents who had, in the context of Department of Homeland Security enforcement actions been arrested and federally prosecuted for identity theft]

It is clear that [CLIENT]'s conviction and incarceration cannot amount to "clear, cogent and convincing evidence" that she intended to abandon her son within the confines of the statute. Like many undocumented immigrants, [CLIENT] used identifying information that was not her own to gain employment in this country. After an immigration raid by the Immigration and Customs Enforcement, Rosa was detained and prosecuted for aggravated identity theft under 18 U.S.C. § 1028(a)(1). This federal statute contains a mandatory two-year prison sentence, which [CLIENT] served.[2]

[2] It is important to note that the U.S. Supreme Court recently addressed the issue of under what circumstances can federal prosecutors bring charges and secure convictions of undocumented workers for aggravated identity theft under 18 U.S.C. § 1028(a)(1). In *Flores-Figueroa v. U.S.*, 556 U.S. ---, 129 S.Ct. 1886, 1894 (2009).
The U.S. Supreme Court ruled that in order to win federal prosecutions under the this statute, federal prosecutors must prove both that the undocumented worker charged was using false documents and that the immigrant worker knew that the false documents they were using contained a social security number that in actuality belonged to another person. It is an unfortunate irony that [CLIENT]'s incarceration stemmed from criminal proceedings in which the government under this U.S. Supreme Court ruling would have failed to plead or prove facts sufficient to sustain a conviction for aggravated identity theft under 18 U.S.C. § 1028(a)(1). Id. It is very unlikely that [CLIENT] would be charged, much less convicted, of

Consistent with its inherent involuntariness, incarceration for any reason is routinely rejected as a grounds for "willful abandonment" with the intent to permanently severe ties with a child. *See In re C.J.G.*, 75 S.W.3d 794, 801 (Mo. Ct. App. 2002) ("a finding of abandonment is inconsistent with a situation where a child has been taken from a parent involuntarily, such as in protective custody cases" where father is incarcerated); *In re Baby Girl W.*, 728 S.W.2d at 549 (no abandonment, where, upon release from prison, father actively opposed termination proceedings). Incarceration in and of itself is insufficient because "[t]he forced separation operates to create the very circumstances (*i.e.*, lack of communication and visitation), complained of in the termination proceedings." *In re C.J.G.*, 75 S.W.3d at 801. This is precisely what happened here.

Moreover, [CLIENT]'s actions themselves outright defy any notion that she intentionally or willfully abandoned her son. To the contrary, she reportedly did everything in her power, with her limited resources, to prevent her child from being taken from her. [INSERT FACTS THAT DEMONSTRATE REUNIFICATION EFFORTS] There simply is no basis for a finding of abandonment.

Aside from abandonment, the [STATE or Plaintiff] argues for termination of parental rights [Alternate language: for custody; for adjudication of child abuse or neglect) based in part on a finding of unfitness due to [CLIENT]'s immigration

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this sentence enhancing statute today.

status. A finding of unfitness based solely on [CLIENT]'s immigration status would be inappropriate, and similarly fails to meet the statutory strictures. Plaintiff claims that [CLIENT]'s "lifestyle as an undocumented person is not a lifestyle that can provide stability for a child. Plaintiff also asserts that a child cannot be educated in this way, always in hiding or on the run."

As discussed in more detail below, weighing the legality of a parent's mere *presence* in the United States as an undocumented immigrant against the American citizenship of proposed adoptive parents has no place in termination proceedings—no more so than weighing their respective personal wealth. Any reliance by the Plaintiff on the fact that [CLIENT] is an undocumented immigrant who faces deportation to terminate her rights should be rejected by this Court. *See In the Interest of Angelica L. and Daniel L.*, 277 Neb. 984, 767 N.W.2d 74, 93 (Neb. 2009) ("we do not conclude that Maria's attempt to bring herself and her child into the United States, in the belief that they would have a better life here, shows an appreciable absence of care, concern, or judgment").

C. Best Interest of the Child

[This section is written for a termination of parental rights case or a child abuse or neglect adjudication, but can be adapted for use in a contested custody case].

The [STATE'S OR PLAINTIFF'S] analysis of what is in the child's best interests is fatally flawed. The [STATE/PLAINTIFF] improperly disregards the strong presumption that the child should remain with [CLIENT] and instead weighed how, in the Court's opinion, the child would fare in the custody of an

American couple versus [CLIENT], an immigrant who the State presumes would likely return to her native Guatemala.

When an alien-parent's minor child is a United States citizen and the alien parent is deported, it is the parent's prerogative whether to take the minor child along or leave the child in this country. *Liu v. United States Dep't of Justice*, 13 F.3d 1175, 1177 (8th Cir. 1994); *see also Newton v. Immigration & Naturalization Service*, 736 F.2d 336, 343 (6th Cir. 1984). As the Supreme Court of Nebraska recently reaffirmed:

> [T]he "best interests" standard is subject to the overriding presumption that the relationship between parent and child is constitutionally protected and that the best interests of a child are served by reuniting the child with his or her parent. This presumption is overcome only when the parent has been proved unfit.

In the Interest of Angelica L. and Daniel L., 277 Neb. 984, 767 N.W.2d 74, 92 (Neb. 2009). Parental rights are not forfeited simply because a mother is detained by immigration authorities or deported; nor can the deportation itself form the basis of a termination decision. *Id.* at 94.

A non-citizen parent's rights over her dependent child directly relate to the best interest of the child analysis and create a strong presumption in favor of keeping the child with his biological mother. Keeping the family together would preserve the continuity of the family's heritage. Placing greater value on a childhood in the United States than a childhood with his biological mother in her native country completely disregards the "fundamental interest" of the mother and devalues her social, cultural and biological ties with her child. Moreover, failing

to address the potential harm to the child in the loss of any potential contact with his biological mother, family and cultural heritage ignores important interests of the *child.* Specific risks to children associated with loss of contact with a biological parent can include:

- Permanent cut-off in family ties results in a grief-type experience, as though there were the death of a loved one.
- The usual life passages such as adolescence, marriage, childbirth, deaths, or divorce often reactivate the feelings of separateness from the family of origin.
- With adoption, some children are at risk of losing intimate contact with and connection to their family, ethnic or cultural heritage.

See Matthew B. Johnson, *Examining Risk to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. Rev. L. & Soc. Change, 397, 414-15 (1996). As this article notes:

> When children are to be adopted as a result of some perceived inadequacy in their parents, a significant risk of a negative impact on the child's identity and self-esteem results. When the message is that the parents were inadequate to provide care and the child cannot visit or even see the family of origin, the child must either disconnect psychologically from the family of origin, with the resultant loyalty conflict, or accept some injury to their self-esteem for maintaining some identification with the 'defective family.'

Id. at 415 (citations omitted).

Moreover, any sort of balancing between the rights of a biological parent against the interests of third parties, such as a foster or potential adoptive family has been held to improperly encroach on the prerogatives of the biological parents. In *Troxel v. Granville*, 530 U.S. 57 (2000), the United States Supreme Court emphatically confirmed that a court cannot favor the interests of third parties (in *Troxel*, grandparents) to override the rights of a parent. "So long as a parent

adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69.

In its efforts to terminate [CLIENT]'s parental rights, the State is disregarding these well settled principles and instead relies heavily on the perceived benefits to [CLIENT]'s son in remaining in the United States rather than returning to Guatemala with his mother. [INSERT FACTS]

However, a best interest analysis must start with the fundamental constitutional rights of a parent, not what situation might be "better" for the child. *In the Interest of Angelica L. and Daniel L.*, 277 Neb. 984, 767 N.W.2d at 92 ("whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests. We reiterate that the "best interests" of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another."); *see also Ruth v. State*, 803 S.W.2d 528, 532 (Mo. Ct. App. 1990) ("The General Assembly has not authorized the removal of children from the custody of their parents on the ground that the children would be 'better off' in another home.").

Thus, a proper analysis must give great deference to the mother's interests and to the potential harm to a child when faced with the loss of continued access to his or her mother, their family and their shared heritage. In *In re H.G., a Minor*, 757 N.E.2d 864, 873 (Ill. 2004), the Illinois Supreme Court observed that if a

court does not adequately consider parental rights, including circumstances beyond a parent's control, that court might find that a parent is "abundantly fit," but "that the child's best interests will not be served by returning the child to the parent's home." The Illinois Supreme Court found such an outcome intolerable.

Precisely because of the sort of injustice that might result when termination decisions do not adequately account for the rights of natural parents and the resulting presumptions, decisions that rely on immigration status should be viewed with great skepticism. In an instructive article on this issue, "*Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*" Professor David Thronson discusses the issue:

> The patterns that emerge from reviewing family court decisions indicate that the impact of immigration status in family court is not an irregular occurrence. *Whether family courts are discriminating, manipulating, obfuscating or accommodating, immigration status influences, sometimes determinatively, the outcome of cases.* … Especially when fundamental rights such as rights arising from the parent-child relationship are at stake, courts need to consider skeptically the constitutionality of arguments asserting the relevance of immigration status."

Id. at 71-2 (emphasis added).

Immigration issues are rarely central (or even relevant) to the required analysis in a termination proceeding, just as they were not here. Considering a parent's immigration status, and certainly relying on it, in such cases is inappropriate. In fact, some Courts have "recognized the in terrorem effect of inquiring into a party's immigration status when irrelevant to any material claim." *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002).

The decision to terminate [CLIENT]'s parental rights has profound emotional and permanent consequences for both mother and child. Rather than placing the unparalleled interests of the biological mother at the apex of the rights and interests involved, the States appears to have put those interests aside, improperly devaluing them in light of [CLIENT]'s immigration status. Terminating [CLIENT]'s parental rights is directly contrary to [INSERT RELEVANT STATE] law and the United States Constitution.

IV. DUE PROCESS PROTECTION OF PARENTAL RIGHTS

[This is drafted for use in a termination of parental rights proceeding. These arguments should also be made at any child abuse and neglect proceeding in which the issues that the State is raising in that proceeding are similar to those discussed below. The language access discussions contained in this section could also be very relevant in a contested custody case].

The State in bringing this case is defective in another important respect: it appears that [CLIENT] was deprived of her procedural due process rights. Procedural due process limits the government's ability to deprive people of interests including those that constitute "liberty" or a parent's interest in the parent-child relationship. In this case, [CLIENT]'s due process rights dictated that, among other things, she be timely informed of the proceedings and her rights in her native language of Spanish in a manner that she could fully understand, so as to meaningfully participate in the process.3

3 *See "Improving Access to Services for Persons with Limited English Proficiency,"* Exec. Order No. 13, 166, *reprinted at* 65 FR 50121 (August 16, 2000) (confirming that Title IV requires applicable state actors to "take steps to ensure that language barriers [do] not exclude LEP persons from effective participation in [the system's] benefits and services," and citing as Supreme Court precedent *Lau v. Nichols,* 414 U.S. 563 (1974)).

A. Due Process Extends to Immigrant Family Relations

The U.S. Supreme Court has long recognized that state intervention in a parent-child relationship is subject to constitutional oversight, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923), and that a familial relationship is a liberty interest entitled to substantial due process. *Lehr v. Robertson*, 463 U.S. 248 (1983). This supports the position that "parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. at 754. And perhaps most importantly, the Court has recognized that the "Due Process clause *applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.*" *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (emphasis added).

Missouri law similarly forbids violations of parent-child relations without the adequate protection of due process standards. And, in a termination of parental rights proceeding, the "[c]ourt must be diligent to uphold the requirements of due process and protect the parent's fundamental liberty interest in the parent-child relationship. The termination of parental rights is an awesome power that involves fundamental liberty interests associated with family and child rearing." *In re E.A.C.*, 253 S.W.3d at 601.

Indeed, this Court has found that that the termination of parental rights is tantamount to a "civil death penalty." *In re K.A.W. and K.A.W.*, 133 S.W.3d at 12. In *K.A.W.*, the Court explained that: "A parent's right to raise her children is a

fundamental liberty interest protected by the constitutional guarantee of due process. It is one of the oldest fundamental liberty interests recognized by the United States Supreme Court…. Those faced with forced dissolution of their parental rights have a more critical need for protections than do those resisting state intervention into ongoing family affairs." *Id.* This is why Missouri law mandates that "the parent, whose rights are threatened, must be given an opportunity to defend the allegations against them." *In re E.A.C.*, 253 S.W.3d at 601.

B. Additional Due Process Protections for LEP Persons

In order to effectuate the due process mandated by the Supreme Court and Missouri law, in connection with a proceeding involving a limited English proficiency ("LEP") parent, like [CLIENT], the Court must ensure that [CLIENT] is provided with an oral interpretation and translation of written materials. Thus far, this does not appear to have happened here, depriving [CLIENT] of her due process rights.

Indeed, Missouri law mandates that state courts shall appoint qualified interpreters in all civil legal proceedings in courts of record in which the non-English speaking person is a party or a witness. Mo. Rev. Stat 476.800 and 476.803(1). In fact, Missouri court practice permits, even prior to any proceeding requiring an interpreter, that one or both private parties deposit an amount of money "reasonably necessary" to cover interpreter costs, and that the court can require payment of the interpreter costs from that deposit. In at least some

counties, parties to civil cases who call a witness needing an interpreter must "arrange and pay for such interpreter." Mo. Ann. Stat. 476.806.3; Missouri 9th Jud. Cir. Ct. R. 56.1 ("In any civil action, an attorney representing a party or a party, not represented by an attorney, intending to call a witness who will require a foreign language interpreter shall arrange and pay for such interpreter."). *See also* 21st Jud. Cir. Ct. R. 25.1 (the court will arrange for an interpreter but not until after the requisite deposit has been made). And this is not a novel approach—for over 10 years, Missouri has been a member of the Consortium for Language Access in the Courts, whose mission is "to promote equal access to justice in courts and tribunals by eliminating language barriers for persons with limited English proficiency." Consortium for Language Access in the Courts, Mission Statement, *available at:*

http://www.ncsconline.org/D_Research/CourtInterp/MissionStatementFinal.pdf

(last visited Dec. 29, 2009). Thus, the court in this case—either sua sponte or through oversight of the parties' case—is obligated to ensure that [CLIENT] is provided with resources to enable her to understand the termination proceedings. A failure to do so would constitute a violation of her due process rights and provide grounds for reversal of the termination order.

C. The Court Has Failed to Protect [CLIENT]'s Due Process Rights

[INSERT FACTS]

[CLIENT] must be given access to a qualified professional interpreter to render that opportunity to defend herself meaningful. *See* Mo. Rev. Stat 476.800 and

476.803(1). This means both the court and the adoptive parents should provide [CLIENT] with sufficient documentation (*i.e., in her native language*) and access to a court interpreter in order to participate in the termination proceeding.

V. CONCLUSION

[This section is an example from a termination of parental rights proceeding and can be adapted for child abuse and/or neglect or custody proceedings]

The Trial Court must give adequate deference to the parental bond between [CLIENT] and her child and the rights that bond ensures. Moreover, the court must avoid lowering the standard for terminating the rights of parents and improperly relying on [CLIENT]'s immigration status to reach its decision. Additionally, the court is required to engage in a proper best interest analysis as opposes to determine that her son should be taken away from her permanently because an American couple would, as the State asserts, be better parents than a biological parent who is an undocumented immigrant. The Court further must ensure that [CLIENT]'s due process rights are protected. [CLIENT] should receive adequate notice and understand the proceedings so as not to prevent her from meaningfully participating in the hearing. Anything less would be an injustice of the Court.

RESPECTFULLY SUBMITTED this [INSERT DATE].

By:_____
Defendant's Counsel
FIRM NAME
Firm Address

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing **Trial Brief in Support of Defendant** was delivered via _____ on [INSERT DATE], to the following:

Plaintiff's Attorney or State Attorney
Firm Address
Firm Telephone

By:_____
[Insert name of Certifier]