IN THE SUPREME COURT OF MISSOURI

CASE NO. SC90359

IN RE THE ADOPTION OF C.M.B.R., MINOR,

S.M. and M.M.

Respondents

vs.

E.M.B.R.,

Appellant.

On Appeal from Circuit Court of Jasper County
Case No. 07AO-JU00477

AMICUS CURIAE BRIEF OF LEGAL MOMENTUM IN SUPPORT OF APPELLANT

Matthew C. Hans (#51541)
POLSINELLI SHUGHART PC
100 S. Fourth Street
Suite 1100
St. Louis, Missouri 63102
Telephone: (314) 889-8000
Facsimile: (314) 231-1776

Of Counsel:
Shari Ross Lahlou
Patricia M. Connally
Christine Sommer
CROWELL AND MORING LLP
1001 Pennsylvania Avenue
Washington, D.C. 20004
Telephone: (202) 624-2500
Facsimile: (202) 628-5228

Attorneys for Legal Momentum

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I. INTEREST OF AMICUS CURIAE LEGAL MOMENTUM

Legal Momentum's Immigrant Women Program (IWP) works nationally to secure and ensure legal options for immigrant women in family court proceedings. With over 50 years of collective experience representing immigrant women and immigrant victims of domestic violence in family courts, IWP leads national advocacy efforts for legal protections, social services, and economic justice for immigrant women. In its work with immigrant women and immigrant victims of domestic violence, IWP has been instrumental in promoting language access to family courts, including its work with the National Language Access Advocates Network and the National Center for State Courts on improving access for limited English proficient persons in the courts.

II. INTRODUCTION

As the result of proceedings that violated well-settled principles of Missouri family law and her constitutional rights to due process, Encarnacion Bail's parental rights were terminated and her son was adopted by a Missouri family. In severing that parent-child relationship, the Jasper County Circuit Court inappropriately determined that Encarnacion's son would be better off growing up with an American couple than with his natural mother, who happens to be 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 Encarnacion's immigration status appears to be the only basis—or at least one of the key bases—on which the Circuit Court based its determination. In addition, it appears that Encarnacion was deprived of due

process 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. Accordingly, Legal Momentum submits this brief of *amicus curie* in support of Petitioner Encarnacion and urges this Court to reverse the order terminating Encarnacion's parental rights and to reunite her with her son.

III. STATEMENT OF THE CASE

Although *amicus curie* Legal Momentum does not have access to the official record,[1] this case has attracted much attention and public accounts of the proceedings below are available. In an article describing the risks faced by immigrant parents, the New York Times shed light on the termination of Encarnacion's parental rights. *See* "*After Losing Freedom, Some Immigrants Face Loss of Their Children*," A15, NYTimes (Apr. 22, 2009), available at: http://www.nytimes.com/2009/04/23/us/23children.html?pagewanted=2&_r=3&th&emc=th. As the Times described:

> When immigration agents raided a poultry processing plant [in Missouri] two years ago, they had no idea a little American boy . . . would be swept up in the operation.
>
> One of the 136 illegal immigrants detained in the raid was [the young boy's] mother, Encarnación Bail Romero, a Guatemalan. A year and a half after she went to jail, a county court terminated Ms. Bail's rights to her child on grounds of abandonment. [Encarnacion's son], now 2, was adopted by a local couple.

[1] The official record has been filed under seal and a motion to unseal the record was denied by this Court.

In his decree, Judge David C. Dally of Circuit Court in Jasper County said the couple made a comfortable living, had rearranged their lives and work schedules to provide [Encarnacion's son] a stable home, and had support from their extended family. By contrast, Judge Dally said, Ms. Bail had little to offer.

...

In February, immigration authorities suspended Ms. Bail's deportation order so she could file suit to recover custody. Ms. Bail's lawyer, John de Leon, of Miami, said his client had not been informed about the adoption proceedings in her native Spanish, and had no real legal representation until it was too late.

...

[After being incarcerated, Encarnacion received an adoption petition at the jail a few weeks later.]

Ms. Bail, who cannot read Spanish, much less English, said she had a cellmate from Mexico translate. With the help of a guard and an English-speaking Guatemalan visitor, Ms. Bail wrote a response to the court. "I do not want my son to be adopted by anyone," she scrawled on a sheet of notebook paper on Oct. 28, 2007. "I would prefer that he be placed in foster care until I am not in jail any longer. I would like to have visitation with my son."

For the next 10 months, she said, she had no communication with the court.

During that time, Judge Dally appointed a lawyer for Ms. Bail, but later removed him from the case after he pleaded guilty to charges of domestic violence.

Ms. Bail said she had asked the public defender who was representing her in the identity theft case to help her determine [her son's] whereabouts, but the lawyer told her she handled only criminal matters. "I went to court six times, and six times I asked for help to find my son," she said. "But no one helped me."

Ms. Bail got a Spanish-speaking lawyer, Aldo Dominguez, to represent her in the custody case only last June. By the time he reached her two months later—she had been transferred to a prison in West Virginia—it was too late to make her case to Judge Dally, Mr. Dominguez said.

Id.

According to the New York Times, in deciding to terminate Encarnacion's parental rights, the Circuit Court purportedly made the following statements: "The only certainties in the biological mother's future is that she will remain incarcerated until next year, and that she will be deported thereafter." "Her lifestyle, that of smuggling herself into the country illegally and committing crimes in this country, is not a lifestyle that can provide stability for a child." "A child cannot be educated in this way, always in hiding or on the run." *Id.*

IV. THE CIRCUIT COURT'S DECISION VIOLATED ENCARNACION'S CONSTITUTIONAL PARENTAL RIGHTS.

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 K.A.W. and K.A.W.,* 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 warned that great care must 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. Indeed, in *In re K.A.W. and K.A.W.*, 133 S.W.3d at 12, this Court stated:

> "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." 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. The termination of parental rights has been characterized as tantamount to a "civil death penalty." It is a drastic intrusion into the sacred parent-child relationship.

Id. (internal citations omitted); *see also In the Interest of K.T.K. v. Crawford County Juvenile Office*, 229 S.W.3d 196, 200 (Mo. App. S.D. 2007) (parental rights are a fundamental liberty interest; courts must strictly construe statutes that provide for the termination of those rights in favor of preserving the natural parent-child relationship). 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.2d 545, 547 (Mo. App. W.D. 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. *In re E.A.C.*, 253 S.W.3d 594, 600-601 (Mo. App. S.D. 2008).

The Jasper County Circuit Court, however, apparently did not these exacting standards in terminating Encarnacion's parental rights. The available information about the proceeding indicates the Circuit Court failed to adequately ensure that a statutory basis for the termination existed, failed to appropriately consider the best interests of the child and failed to provide Encarnacion the language access she was legally entitled to so that she could meaningfully participate in the termination proceedings.

A. Missouri's Statutory Grounds for Terminating Parental Rights Do Not Apply to this Case

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

for termination exist." *In re E.A.C.*, 253 S.W.3d at 600. 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. RSMo. § 211.447.5.

Legal Momentum cannot access the record in this case and, thus, cannot read the Circuit Court's order to fully understand the purported statutory basis to terminate Encarnacion's parental rights. Nonetheless, publicly available information about the case, including the New York Times article quoted above, indicates that the Court relied on the statute's abandonment provision, RSMo. § 211.447.5(1).[2]

And, the sole basis for the Court's abandonment determination apparently was Encarnacion's detention due to her immigration status. In fact, the *only* circumstances

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[2] This provision provides:

The juvenile officer . . . may file a petition to terminate the parental rights ...when it appears that one or more of the following grounds for termination exist:

(1) The child has been abandoned. . ..The court shall find that the child has been abandoned if, for a period of six months or longer:

(a) The parent has left the child under such circumstances that the identity of the child was unknown and could not be ascertained, despite diligent searching, and the parent has not come forward to claim the child; or

(b) The parent has, without good cause, left the child without any provision for parental support and without making arrangements to visit or communicate with the child, although able to do so. . ..

RSMo. § 211.447.5.

which led to Encarnacion'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. If the New York Times article is accurate, the Circuit Court found that upon Encarnacion's incarceration, she abandoned her son: "'The only certainties in the biological mother's future... is that she will remain incarcerated until next year, and that she will be deported thereafter.'" "*After Losing Freedom, Some Immigrants Face Loss of Their Children*," A15, NY Times (Apr. 22, 2009). However, neither Encarnacion's immigration status, nor the related incarceration constitutes abandonment (*see, e.g., In re Baby Girl W.*, 728 S.W.2d at 548); and there is no other colorable basis for the State to exercise its awesome power to irrevocably deprive Encarnacion 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.2d at 549 (citations omitted).

Encarnacion's conviction and incarceration are not "clear, cogent and convincing evidence" that she intended to abandon her son within the confines of the statute. Like many undocumented immigrants, Encarnacion used identifying information that was not her own to gain employment in this country. After an immigration raid by the

Immigration and Customs Enforcement, Encarnacion 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 Encarnacion served.[3]

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. App. W.D. 2002) ("a finding of abandonment is incompatible 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

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[3] It is important to note that the U.S. Supreme Court recently addressed the issue of the circumstances under which a federal prosecutor can 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.*, 129 S.Ct. 1886, 1894 (2009), the U.S. Supreme Court ruled that federal prosecutors must prove both that the undocumented worker was using false documents and that the immigrant worker knew that the false documents contained a social security number that in actuality belonged to another person. It is an unfortunate irony that Encarnacion's incarceration stemmed from criminal proceedings in which the government now likely 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 Encarnacion would be charged, much less convicted, of this sentence enhancing statute today.

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 proceeding." *In re C.J.G.*, 75 S.W.3d at 801. This is precisely what happened here.

Moreover, Encarnacion'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. She steadfastly refused to give her son up for adoption, consistently tried to remain in contact with him, and expressed her intent to reunite with him upon her release. *See "After Losing Freedom, Some Immigrants Face Loss of Their Children,"* A15, NY Times (Apr. 22, 2009) ("I do not want my son to be adopted by anyone," .... "I would prefer that he be placed in foster care until I am not in jail any longer. I would like to have visitation with my son."). She persisted in seeking help from the very judicial system that violated her rights, by, among other things, seeking competent *pro bono* counsel and filing this appeal. There simply is no basis for a finding of abandonment.

Aside from abandonment, the Circuit Court might have based its termination ruling in part on a finding of unfitness. To the extent that it is the case, it appears that any such finding was also inappropriately based solely on Encarnacion's immigration status, and similarly fails to meet the statutory strictures. For example, the Circuit Court reportedly opined that Encarnacion's "lifestyle, that of smuggling herself into the country illegally and committing crimes in this country, is not a lifestyle that can provide stability

for a child." The Circuit Court also reportedly concluded that "[a] child cannot be educated in this way, always in hiding or on the run." *Id.*

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 Circuit Court on the fact that Encarnacion is an undocumented immigrant who faces deportation to terminate her rights should be rejected by this Court. *See In re 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").

B. The Circuit Court's Best-Interest-of-the-Child Analysis Was Also Flawed.

Not only does the Circuit Court's analysis with respect to a statutory basis for termination appear to be fatally flawed in that, among other things, it is inappropriately based on Encarnacion's immigration status, but the same appears to be true of the Court's analysis of what is in the child's best interests. The Circuit Court improperly disregarded the strong presumption that the child should remain with Encarnacion. Instead, the Circuit Court weighed how, in the Court's opinion, the child would fare in the custody of an American couple versus Encarnacion, an immigrant who the Circuit Court presumed 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, the parent decides whether to take the minor child along or leave the child in

this country. *Liu v. U.S. Dep't of Justice*, 13 F.3d 1175, 1177 (8th Cir. 1994); *see also Newton v. Immigr. & Naturalization Serv.*, 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 re Angelica L. and Daniel L., 277 Neb. 984, 767 N.W.2d at 92. 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). *See also* James D. Kremer, Kathleen A. Moccio & Joseph W. Hammell, *Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy*, A Report by Dorsey & Whitney LLP to the Urban Institute (2009) (detailing the emotional and financial difficulties faced by US citizen children when separated from parents because of immigration status).

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 as appears to have happened here, improperly encroaches on the prerogatives of the biological parents. In *Troxel v. Granville*, 530 U.S. 57 (2000), the United States Supreme Court unequivocally confirmed that a court cannot favor the interests of third parties (in *Troxel*, grandparents) to override the rights of a parent. "[S]o 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.

The Circuit Court apparently disregarded these well settled principles and instead relied heavily on the perceived benefits to Encarnacion's son in remaining in the United States rather than returning to Guatemala with his mother. According to the New York Times article, the Circuit Court determined that, among other things, because the proposed adoptive couple made a comfortable living, they would do a better job rearing Encarnacion's son than she would herself. *See "After Losing Freedom, Some Immigrants Face Loss of Their Children,"* A15, NY Times (Apr. 22, 2009).

However, a best-interest analysis must start with the fundamental constitutional rights of a parent, not what situation might be judged as "better" for the child. *In re 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 L. v. State,* 830 S.W.2d 528, 531 (Mo. App. S.D. 1992) ("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.*, 197 Ill.2d 317, 757 N.E.2d 864, 873 (Ill. 2001), 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 here. Considering a parent's immigration status, and certainly relying on it, in such cases is unconstitutional. 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 Encarnacion'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 Circuit Court appears to have put those interests aside, improperly devaluing them because of

Encarnacion's immigration status. The Circuit Court's decision in this regard is directly contrary to Missouri law and the United States Constitution and should be reversed.

V. THE CIRCUIT COURT VIOLATED ENCARNACION'S DUE PROCESS RIGHTS.

The Circuit Court's termination of Encarnacion's parental rights and concurrent adoption of her son are defective in another important respect: it appears that Encarnacion was deprived of her procedural due process rights in the termination and adoption proceedings. Procedural due process limits the government's ability to deprive people of interests -- including those that constitute a mother's interest in the parent-child relationship. In this case, Encarnacion had a due process right to be timely informed of the proceedings and a right to be informed of these proceedings in her native language of Spanish, so that she could meaningfully participate in the process.[4] That appears not to have happened, rendering the resulting decision constitutionally infirm.

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

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[4] *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)).

is a liberty interest entitled to substantial due process. *Lehr v. Robertson*, 463 U.S. 248 (1983). Indeed, "parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. at 753-754. And perhaps most importantly, the Court has established 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

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." RSMo. § 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—was obligated to ensure that Encarnacion was provided with resources to enable her to understand the termination proceedings. Its apparent failure to do so constitutes a violation of her due process rights and provides a separate ground for reversal of the termination order.

To the extent that the State of Missouri participated in this proceeding, it had an independent obligation to ensure that Encarnacion's due process rights were protected by providing her relevant information in her native language. As a recipient of federal

funding,[6] the Missouri Department of Social Services ("DSS") has a Title IV obligation to communicate with LEP individuals, like Encarnacion, in a manner in which the individuals can fully understand. In this case, it would be reasonable to expect that DSS participated in the proceeding and would in the normal course provide the biological parent, Encarnacion, with copies of any reports, testimony, or recommendations about her child's adoption. In that case, those materials are required to be in her native language, Spanish, or that their contents be communicated to her in a way that she can understand. Because of these obligations, DSS in fact has existing translation resources for use in adoption cases.[7] It does not appear that those resources were deployed here, thereby violating Encarnacion's constitutionally and statutorily protected rights.

C. The Court Failed to Protect Encarnacion's Due Process Rights.

Although denied access to the record, the New York Times article quoted above highlights the lack of due process Encarnacion received.

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[6] Missouri Department of Social Services, Child Welfare Manual, Sec. 4, Ch. 30, Subsec. 2, "Legal Basis and Funding Source" (eff. date Mar. 21, 2009), available at: http://www.dss.mo.gov/cd/info/cwmanual/section4/ch30/sec4ch30sub2.htm.

[7] *Id., Sec. 3, Ch. 5, "Attachment B: Listing of Purchased Services"* (eff. date Apr. 17, 2009) ("The State of Missouri contracts with several agencies to provide language translation services."), *available at*: http://www.dss.mo.gov/cd/info/cwmanual/section3/ch5/sec3ch5attachb.htm.

Among the failings to adequately protect Encarnacion's due process rights reported in the article is that Encarnacion "had not been informed about the adoption proceedings in her native Spanish, and had no real legal representation until it was too late." Instead, Encarnacion had to rely on translations by fellow inmates and the charity of her prison guards[8] to communicate to the Circuit Court that she had not, in fact, abandoned her son. *See "After Losing Freedom, Some Immigrants Face Loss of Their Children,"* A15, NYTimes (Apr. 22, 2009) Moreover, the Circuit Court seems to have been aware that Encarnacion received neither appropriate representation nor an accurate understanding of the proceedings against her. *Id.* ("Judge Dally appointed a lawyer for Ms. Bail, but later removed him from the case after he pleaded guilty to charges of domestic violence." "I went to court six times, and six times I asked for help to find my son," she said, "But no one helped me."). And, "[f]or the next 10 months, she said, she had no communication with the court." *Id.*

If these facts are confirmed by the record, it would be clear that Encarnacion's due process rights have been violated. The Circuit Court was obligated to present Encarnacion with "an opportunity to defend the allegations against [her]." *In re E.A.C.*,

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[8] None of whom would meet the definition of "qualified interpreters," as outlined by the National Center for State Courts. *"Court Interpretation in Protective Order Hearings: Judicial Benchcard,"* 1-2, Nat'l Ctr. for State Courts, *available at*: http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=103.

253 S.W.3d at 601. As a non-English speaking person, Encarnacion must have been given access to a qualified professional interpreter to render that opportunity to defend herself meaningful. *See* RSMo. §§ 476.800 and 476.803(1). Thus both the Circuit Court and the adoptive parents should have provided Encarnacion with sufficient documentation (*i.e., in her native language*) and access to a court interpreter in order to participate in the termination proceeding.

The Circuit Court apparently did not meet these burdens. Rather, the Circuit Court appears to have condemned her as a person that "smuggl[es] herself into the country illegally and commit[s] crimes in this country" and terminated her parental rights without any regard to her constitutionally-guaranteed rights. *See "After Losing Freedom, Some Immigrants Face Loss of Their Children,"* A15, NYTimes (Apr. 22, 2009). Such disregard for due process provides an independent basis for reversal.

VI. CONCLUSION

The Circuit Court failed to give adequate deference to the parental bond between Encarnacion and her child and the constitutional rights protecting that bond. Instead, the Circuit Court impermissibly lowered the standard for terminating the rights of parents and improperly relied on Encarnacion's immigration status to reach its decision. Most egregiously, the Circuit Court failed to engage in a proper best-interest analysis. Instead, it determined that Encarnacion's son should be taken away from her permanently because an American couple would, in the Circuit Court's view, be better parents than the biological parent, who happens to be an undocumented immigrant. The Circuit Court further failed to ensure that Encarnacion's due process rights were protected. Not only did the Court fail to

ensure that Encarnacion had notice of and understood the proceedings but compounded that error by relying on her inability to participate as evidence that she abandoned her son. This Court should correct this injustice, reverse the order of termination, and reunite Encarnacion with her son.

RESPECTFULLY SUBMITTED this 11th day of January, 2010.

POLSINELLI SHUGHART PC

By: _____

Matthew C. Hans
100 S. Fourth Street
Suite 1100
St. Louis, Missouri 63102
Telephone: (314) 552-6820

Of Counsel:
Shari Ross Lahlou
Patricia M. Connally
Christine Sommer
CROWELL AND MORING LLP
1001 Pennsylvania Avenue
Washington, D.C. 20004
Telephone: (202) 624-2500
Facsimile: (202) 628-5228

CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE 84.06(B)

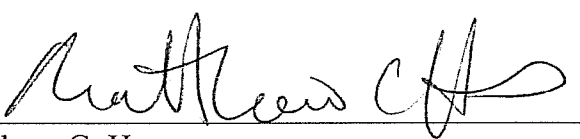
The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to word count function of Microsoft Word 2000 by which it was prepared, contains 6492 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the Appendix.

The undersigned further certifies that the CD-ROM filed herewith containing this Appellant's Brief in electronic form complies with the Missouri Supreme Court Rule 84.06(g), because it has been scanned for viruses and is virus-free.

Dated: January 11, 2010

Respectfully submitted,

POLSINELLI SHUGHART PC

By: 

Matthew C. Hans
100 S. Fourth Street
Suite 1100
St. Louis, Missouri 63102
Telephone: (314) 889-8000
Facsimile: (314) 231-1776

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing **Amicus Brief of Legal Momentum in Support of Petitioner** was delivered via U.S. Mail, postage pre-paid, on January 8, 2010, to the following:

William J. Fleischaker
Missouri Bar No. 22600
P. O. Box 996
Joplin, MO 64802
Telephone: 417.623.2865
Facsimile: 417.623.2868
E-mail: bill@ozarklaw.com

Christopher M. Huck
R. Omar Riojas
DLA PIPER LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, Washington 98104
Telephone: 206.839.4800
Facsimile: 206.839.4801
E-mail: christopher.huck@dlapiper.com
E-mail: omar.riojas@dlapiper.com

Attorneys for Petitioner

Joseph L Hensley
Law Office of Hensley & Nicholas LLC
610 S. Pearl, Suite A
Joplin, Missouri 64801
Facsimile: 417.627.0105

Richard L. Schnake
Neale & Newman LLP
One Corporate Centre, Suite 1-130
1949 East Sunshine
Post Office Box 10327
Springfield, Missouri 65808
Facsimile: 417.882.2529

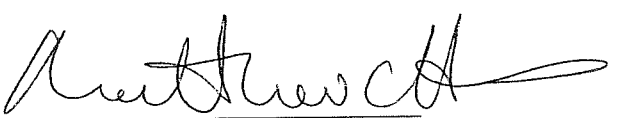
Attorneys for Respondents

Belinda Elliston
Elliston Law Offices
1601 South Madison Street, #C
Webb City, Missouri 64870
Facsimile: 417.673.2405

Attorneys for Jasper County Juvenile Office

Jamie Garrity
209 West 6th Street, Suite 3
Joplin, Missouri 64801
Facsimile: 417.782.7004

Guardian Ad Litem

By: 
Matthew C. Hans