

**IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT**

Case No. SD32228

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

**S.M. and M.M.,
Respondents,**

v.

**E.M.B.R.,
Appellant.**

On Appeal from the Circuit Court of Jasper County, Family Court
Hon. David C. Jones

**BRIEF OF THE YOUNG CENTER FOR IMMIGRANT CHILDREN'S
RIGHTS AT THE UNIVERSITY OF CHICAGO, WASHINGTON
UNIVERSITY'S CIVIL JUSTICE CLINIC: CHILDREN & FAMILY
DEFENSE PROJECT, MICHIGAN STATE UNIVERSITY COLLEGE OF
LAW IMMIGRATION CLINIC, ACLU OF EASTERN MISSOURI, AND
LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT**

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I. STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Amici curiae do not have access to the record of this case, and therefore adopt the statement of jurisdiction and facts set forth in Appellant's Brief. *Amici* do have a copy of the Circuit Court opinion as it was posted to a website (www.intheinterestofjamison.com (last viewed January 24, 2013)).

II. STATEMENT OF INTEREST

The Young Center for Immigrant Children's Rights at the University of Chicago (formerly the Immigrant Child Advocacy Project), advocates on behalf of the best interests—safety, permanency and well-being—of unaccompanied immigrant children. For nine years, the Young Center has worked to protect the rights of children and parents when they are separated as a result of international migration and immigration enforcement efforts, and has been appointed as the Child Advocate, or best interests guardian *ad litem*, for hundreds of unaccompanied children in immigration proceedings. The Young Center has a vested interest in the fair and just application of the best interests standard for children, regardless of their immigration status or that of their parents.

The Washington University Law School Civil Justice Clinic (Civil Justice Clinic) is a teaching law office at Washington University Law School in St. Louis, Missouri. The Civil Justice Clinic, founded in 1973, trains law students to provide effective legal assistance while serving vulnerable communities in Missouri,

including children and parents involved in the juvenile courts, immigrants, and women and children subjected to domestic violence. Under the direct supervision of law faculty with national and local expertise regarding juvenile courts, children's rights, adoption, child protection, and juvenile justice, the Civil Justice Clinic provides high quality and holistic legal representation to children and families in the St. Louis metropolitan area who are most vulnerable to coercive state intervention and family dissolution.

The Michigan State University College of Law Immigration Clinic ("Immigration Clinic") engages students with immigrant communities through direct client representation and systemic advocacy for vulnerable populations that are otherwise unable to obtain legal representation. The Immigration Clinic routinely represents immigrant children and families in immigration proceedings and state proceedings related to child welfare.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 600,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU of Eastern Missouri is an affiliate of the ACLU based in St. Louis with over 4,800 members in Eastern Missouri. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the Bill

of Rights, including the fundamental rights to due process and of parents and their children.

Anita Maddali, Assistant Professor of Law and Director of Clinics at Northern Illinois University College of Law in DeKalb, Illinois, Bruce Boyer, Clinical Professor and Director of the Civitas Childlaw Clinic, Loyola University Chicago School of Law and Alexandra Fung, Salisbury Clinical Teaching Fellow at the Civitas Childlaw Clinic, Loyola University Chicago School of Law (together, “Law Professors”) are professors and practitioners with expertise in child welfare law or in immigration law as it is applied to separated and unaccompanied children, and who have a particular interest in the intersection of immigration and child welfare proceedings.

III. ARGUMENT

A. Introduction

Each year, thousands of children are separated from their parents when their mother or father is detained or faces deportation for violations of federal immigration law. Whether parents are arrested on immigration violations or charged with a federal crime related to their immigration status¹ their detention

¹*Amici* note that in the case before this Court, the mother was charged and sentenced pursuant to a federal aggravated identity theft statute. The Supreme

separates them from their children and heightens the risk of permanent separation. Increasingly, allegations about parents' unauthorized immigrant status are used as evidence in support of petitions to terminate parental rights, while a blind eye is turned toward parents' efforts to care for their children, and while the state's failure to provide reunification services is ignored.

It is black letter law that unauthorized immigrant parents are "persons." As such, they are entitled to the same vigorous protection of their right to the care and custody of their children as all other parents—even, and especially when the initial separation is caused by immigration enforcement. When an unauthorized immigrant mother is separated from her child, her immigration status, limited English proficiency and federal detention can pose significant barriers to her ability to reunify with her child. Courts with the power to permanently separate parents from their children must: 1) ensure that state child welfare officials provide immigrant parents the same opportunity to reunify as non-immigrant parents, 2) maintain the distinction between child welfare proceedings and

Court later held that the manner in which the statute was applied to persons like the mother in this case was unconstitutional. *See Flores-Figueroa v. United States*, 556 U.S. 646, 656-57 (2009).

immigration enforcement efforts, and 3) root out prejudice and bias, to protect the most fundamental right of families: to be together.

B. Courts must protect the parent-child relationship even when families are caught in the crosshairs of immigration enforcement.

Family courts may routinely encounter families where one or both parents or the children are not U.S. citizens or lawful permanent residents. These cases may arise in the normal course of child welfare, adoption, or related cases; or they may be the direct result of federal immigration enforcement efforts, which have separated thousands of children from their parents. All of these cases call for the fair and just adjudication of parents' and children's rights, before families are permanently separated.

1. Today, thousands of children are separated from their parents as a result of immigration enforcement efforts.

An extraordinary number of children are growing up in families with at least one immigrant parent. One quarter all of children in the United States live in immigrant families and “children of immigrants account for nearly the entire growth in the U.S. child population between 1990 and 2008.” Donald J.

Hernandez & Wendy D. Cervantes, *Children in Immigrant Families: Ensuring Opportunities for Every Child in America*, First Focus, 6 (2011) (internal citations omitted). More than 5 million children living in the United States “have at least

one parent who lacks authorization to be in the United States.” David B. Thronson and Judge Frank P. Sullivan, *Family Courts and Immigration Status*, 63 Juv. & Fam. Ct. J. 1, 2-3, (2012) (internal citations omitted). Midwest states in particular have seen a rapid increase in the number of immigrant families. Alan J. Dettlaff, *Immigrant Children and Families and the Public Child Welfare System: Considerations for Legal Systems*, 63 Juv. & Fam. Ct. J. 2, 20 (2012).

Increasing immigration enforcement by the federal government has had a dramatic effect on the number of children in child welfare proceedings, as well as the ability of immigrant families to reunify once they are separated. In 2011, the federal government deported almost 400,000 people from the United States and detained nearly as many individuals with the intention of deporting them. Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, Applied Research Center, 5 (2011). In just six months in 2011, the federal government deported 46,000 parents of U.S. citizen children. *Id.* The Applied Research Center estimates that across the United States more than 5,100 children in foster care have parents who were detained or deported, and that roughly 15,000 more children face the risk of never reunifying with their parents because of immigration enforcement. *Id.* at 6.

2. Parents, even if undocumented, are “persons” entitled to the same rights as other parents.

Immigrant parents, whether authorized or unauthorized, are “persons” entitled to the full protection of their rights to due process and equal protection of the law. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.”).

A parent’s right to the care and custody of her children is a “fundamental liberty interest.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). This right is both fundamental and individual, granting parents latitude in the choices they make in rearing their children—including whether or not to allow others to assist in the children’s care. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 69-73 (2000) (holding unconstitutional a state court ruling that required a fit parent to acquiesce to visitation by others); and *In re A.S.W.*, 137 S.W.3d 448, 453 (Mo. 2004) (upholding a parent’s right to seek help from extended family and close friends when caring for a child and observing that “[p]arenting is frequently a group effort.”). This right exists even when parents struggle to meet the basic needs of their children because of limited financial resources. *See In re A.S.W.*, 137 S.W.3d at 453 (“[T]here is nothing in Section 211.447 that allows a circuit court to

terminate parental rights because, without assistance, the parent lacks the ability to care for the child.”).

The right to care for and have custody of one’s own children continues even when parents have made mistakes, have been separated from their children after an arrest, or lack certain parenting skills. *See In re W.C.*, 288 S.W.3d 787, 795-98 (Mo. App. E.D. 2009) (overturning lower court’s termination of parental rights despite allegations of mother’s drug abuse, failure to provide, and failure to protect the children from an abusive father). *See also In re Interest of Angelica L.*, 767 N.W. 2d 74, 96 (Neb. 2009) (overturning the termination of parental rights stemming from an unauthorized immigrant mother’s failure to take an infant child to a follow-up medical appointment). This interest “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 irretrievable destruction of their family life.” *Santosky*, 455 U.S. at 753. *See also In re K.A.W.*, 133 S.W.3d 1, 21 (Mo. 2004) (overturning the termination of a mother’s parental rights despite the mother’s multiple efforts to have her children adopted).

C. When a parent’s immigration status is a central focus in child welfare proceedings, the parent faces a greater risk that she will be permanently separated from her child.

A parent’s status as an unauthorized immigrant cannot, standing alone, serve as a basis for terminating the parent’s right to the care and custody of her children. Yet it is all too easy for facts connected to the parent’s immigration status to become entangled in the record. Courts have an obligation to ensure that a parents’ immigration status does not subject them to higher standards than other parents, to separate out those facts and ensure the proceedings are not prejudiced against the parent because of immigration status. Courts must remain vigilant and require that the state meet its responsibility to provide reunification services to families separated because of immigration enforcement. Regardless of a parent’s immigration status courts must ensure that the decision to permanently separate a mother and child is consistent with state law and free from bias or prejudice.

1. Risk #1: Immigrant Parents are not afforded the same opportunities or support to take the steps necessary to reunify with their children.

When children are separated from their parents, states have an abiding interest in reunifying the family. *See, e.g., Santosky*, 455 U.S. at 767 (a state “registers no gain towards its declared goals when it separates children from the custody of fit parents”) (quoting *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)).

Missouri law explicitly recognizes the centrality of family bonds to a child’s best interests, *see* Mo. Rev. Stat. § 211.443(2) (“The provisions of sections 211.442 to 211.487 shall be construed so as to promote the best interests and welfare of the child as determined by the juvenile court in consideration of the following . . . [t]he recognition and protection of the birth family relationship when possible and appropriate”), and requires the State to use “all available services” to meet the needs of children and families seeking to reunify, Mo. Rev. Stat. § 211.183(2). Parents are not solely responsible for working toward reunification; that duty is shared by the State. *See e.g., In re Interest of A.L.B.*, 743 S.W.2d 875, 876 (Mo. App. E.D. 1987) (noting the “reciprocal duties and responsibilities of the Division of Family Services and the natural parent concerning the reunification of the parent with his children”).

A parent’s immigration status does not diminish the importance of reunification and should not prevent the state from tendering the same services it would provide to U.S. citizen parents. The responsibility for “vulnerable children who are caught in the clash of laws, culture, and parental rights that occur when their parents cross international boundaries . . . initially lies with child protection workers and courts in the State’s juvenile system.” *In re Interest of Angelica L.*, 767 N.W. 2d at 80 (Neb. 2009). When a child is separated from a parent because of the parent’s arrest, the parent’s limited English-language, lack of literacy skills,

unfamiliarity with the legal system, or poverty, may delay or inhibit the family's reunification. *See, e.g., In re Interest of Angelica L.*, 767 N.W. 2d at 80. These obstacles do not exempt the state from protecting the child by providing services to help the parent and child reunify. *See In re Interest of Mainor T. and Estela T.*, 674 N.W.2d 442, 462 (Neb. 2004) (mother denied due process when the record was "devoid of any showing that [child welfare] attempted to contact [the mother], determine what rehabilitative steps could be taken in spite of her deportation, or determine whether visitation of some sort was possible" and when the court set an objective of reunification "without any means by which [the mother] could achieve that goal, without any requirement that [child welfare] make reasonable efforts to provide services toward that objective.")

In cases in which an immigrant parent is separated from her child, state child welfare services and courts should assist, or ensure that parents are assisted, in overcoming barriers to reunification before considering termination of the parents' rights. If services, such as parenting instruction or counseling services, would be likely to aid a parent in gaining parenting skills, then termination of parental rights is not appropriate. *See In re A.S.W.*, 137 S.W.3d at 453 (termination of parental rights reversed after a finding that there was no substantial evidence that additional services would fail or be unavailable to provide the father with necessary assistance in parenting his child.)

In a case similar to the one before this Court, the Nebraska Supreme Court reversed a decision terminating the rights of an unauthorized immigrant mother who was accused of abusing her children and was not present at the termination proceeding, having been deported after her arrest for striking her child. *See In re Interest of Mainor T. and Estela T.*, 674 N.W.2d at 462. The court observed that the state child welfare agency had failed to show that it “attempted to contact [the mother], determine what rehabilitative steps could be taken in spite of her deportation, or determine whether visitation of some sort was possible” before her parental rights were terminated. *Id.*

2. Risk #2: Parents’ decisions are viewed through the lens of immigration enforcement rather than child protection.

Parents who are separated from their children as a result of immigration enforcement—including workplace raids like the one that led to Encarnacion Bail Romero’s arrest—are most often working in order to provide for their children and families. Viewed through the prism of immigration enforcement, working without government authorization is a negative factor. But child welfare systems are not engaged in federal enforcement of immigration law and policy. Viewed through the prism of child welfare, a parent’s decision to work in order to feed, clothe and educate a child is a positive, even necessary parenting trait.

Immigration law operates within a completely different set of values and policy priorities from the child welfare system. *See* Thronson & Sullivan, *supra* at 4. For example, immigration law generally excludes consideration of a child’s best interests in making decisions about the child or the parent. *See, e.g., id.* at 7 (immigration law is “stripp[ed] . . . of consideration for the best interests of children.”). There is no “meaningful consideration of children’s best interests” in immigration removal proceedings or other applications for lawful immigration status. *Id.* at 6-7. Similarly, immigration law provides few opportunities for poor parents to gain lawful entry into the United States in order to work and support their families.

For most parents, there is no “line” to wait in to gain lawful status. *See* David B. Thronson, *You Can’t Get Here From Here: Toward a More Child-Centered Immigration Law*, 14 Va. J. Soc. Pol’y & L. 58, 66-67 (2006) (dispelling the myth of “the line” and noting that it is difficult and even impossible for some families to obtain legal status, especially if they are already present in the United States). A parent’s decision to migrate often stems from a desire to provide a better life for his or her children. “[P]overty and the promise of opportunity are undeniably key drivers of migration.” Aaron Terrazas, *Migration and Development: Policy Perspective from the United States*, Migration Policy Institute, 5 (2006).

Many parents apprehended as a result of immigration enforcement efforts were engaged in the activities of daily life intended to help their children: working, commuting, or driving. *See* Wessler, *supra* at 31 (noting the increase in the day-to-day risks of deportation for activities such as driving without a license); Randy Capps *et al.*, *Paying the Price: The Impact of Immigration Raids on America's Children*, The Urban Institute, 10 (2007) (worksite raids have led to the administrative and criminal arrests of thousands of undocumented workers, many of which are parents). Like many other struggling families, these parents rely upon other family members for housing and child care. Absent the parents' immigration status, these decisions would likely be well-regarded by family law courts contemplating the rights and responsibilities of parents. *See, e.g., Troxel*, 530 U.S. at 63-64 (recognizing the proliferation of single-parent households and acknowledging the assistance rendered by non-nuclear family members in the "everyday tasks of child-rearing").

For many parents, the safety and well-being of their children drives their decision to migrate to and find work in the United States. The poverty and struggles they face in the United States may be far less than what they experienced in their country of origin. When making a determination about parental fitness, courts must be careful to view the actions of these parents from a child welfare, rather than an immigration enforcement, perspective.

3. Risk #3: Parents must overcome bias and prejudice directed toward unauthorized immigrants or immigrants generally.

Appellate courts have consistently endeavored to weed out the improper cultural bias that can easily influence decisions as subjective as whether a parent is fit, or whether a particular conclusion is in the best interests of a vulnerable child.

In 1982, the Supreme Court warned:

Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. *Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.*

Santosky, 455 U.S. at 762-3 (emphasis added) (internal citations omitted).

The *Santosky* Court's concerns were well-founded. In 1971 in Illinois, an unwed father could summarily lose custody of his children, absent any allegation of abuse, neglect or abandonment, based on nothing more than his status as an unwed father and widely-held stereotypes about unwed fathers and their capacity

to care for their children. *Stanley*, 405 U.S. at 646. Rejecting this “procedure by presumption,” the Supreme Court invalidated the procedure that relied on the unwed father stereotype and underlying cultural judgments about men who chose not to marry the mothers of their children. *Id.* at 658.

Similarly, in 1984, a divorced, Caucasian mother in Florida could be stripped of custody of her daughter for having a relationship with and then marrying an African-American man because that choice was a “life-style unacceptable . . . to society,” and would inevitably render her child “vulnerable to peer pressures and . . . social stigmatization.” *Palmore v. Sidotti*, 466 U.S. 429, 430-31 (1984) (describing the trial court opinion). Here, too, the Supreme Court rejected a decision that turned on widely-held biases against interracial marriage and warned that “private biases and the possible injury they might inflict” upon a child were impermissible considerations in a decision to separate a child from her parent. *Id.* at 433.²

So, too, in many states, developmentally disabled parents could lose custody of and rights to their children because of the designation of “mental retardation” or mental illness. A diagnosis of mental illness or an IQ test with a

² Notably, the mother’s second marriage would have been illegal in some states less than 20 years earlier. *Loving v. Virginia*, 388 U.S. 1, 6 (1967).

low score, combined with allegations of neglect would often result in the termination of parental rights. *See In re L.A.H.*, 622 S.W.2d 319, 321 (Mo. App. E.D. 1981) (terminating the rights of a mother with an IQ of 58 despite evidence that she was capable of caring for her child with supervision). These cases are notable for the lack of consideration given to the parents' ability to care for their children and the state's failure to provide meaningful reunification services. Today, providing services to parents struggling to care for their children is the norm. *See In re C.W.*, 211 S.W.3d 93, 102 (Mo. 2007) (reversing the termination of parental rights for a mother with mental illness whose child was removed based on the fear of potential neglect and despite the mother's compliance with a treatment program) (overruled on other grounds).

“The fact that many judgments as to acceptable parenting standards are based on middle-class stereotypes cause particular problems for the handicapped parent,” because a society that places such “great value” on intelligence often treats those with developmental disabilities as “deviants.” Judge Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 Fam. L. Q. 253, 271-72 (1992). Yet “[t]he relationship between a parent who suffers a handicap and his or her biological child should be entitled to the same respect and safeguards as that of the parent-child relationship between a normal parent and his or her biological child.” *Id.* at 257. Today, stereotypes about mental illness are no

longer a valid basis on which to terminate parental rights. *See In re S.M.H.*, 170 S.W.3d 524, 533 (Mo. App. E.D. 2005) (courts do not have “blanket authorization for termination of parental rights on account of mental illness” unless it rises to the level prescribed by statute.)

The stereotypes and prejudice faced by unwed fathers, parents in biracial marriages, and parents with developmental disabilities mirror the challenges encountered by undocumented parents facing permanent separation from their children. For example, “[c]hildren in immigrant families have historically been considered at increased risk for maltreatment as a result of the challenges experienced by their families following immigration.” Dettlaff, *supra* at 20 (internal citations omitted). Yet these stereotypes are not supported by data. *Id.* at 20. To the contrary, “children of immigrants are considerably underrepresented among children who become involved with the child welfare system.” *Id.* at 21.

One stereotype that prejudices immigrant parents facing deportation is the idea that a child will be harmed by returning to the parent’s country of origin, rather than remaining in the United States where their lives are presumed to be “better.” In 2008, the Court of Appeals of Michigan reversed a decision terminating the rights of an unauthorized immigrant father whose children had been removed from the family based on allegations of abuse. *In re B and J*, 756 N.W.2d 234, 242 (Mich. App. 2008). Child welfare authorities subsequently

reported the father to immigration authorities, who detained and deported the father. *Id.* at 237. In its decision, the court rejected the argument that termination was in the children’s best interests because the children would have a “better and more prosperous life” in the United States than in Guatemala. *Id.* at 241. The state’s “subjective belief” that a child will be better off in the United States than living with his parent in the parent’s country of origin is “certainly not evidence” that termination of parental rights is in the child’s best interests, particularly when the child would “lose all ties to [his] native language and culture.” *Id.*

Another stereotype pervading assessments of parental fitness or evaluations of a child’s best interests is the idea that all unauthorized parents are at imminent risk of deportation. In 2003, Georgia child welfare authorities took custody of a child and his siblings after his parents were arrested during a domestic dispute. *In re M.M. et al.*, 587 S.E.2d 825, 827 (Ga. App 2003). A court later terminated the father’s parental rights because he had failed to “legalize” his immigration status, and reasoned that even if he tried to do so he would face deportation, which would result in the child returning to protective custody or returning with her father to “an unknown future in Mexico.” *Id.* at 832. Overturning this decision, the court held that uncertainty about the family’s future was not a proper ground to terminate a father’s rights.

When we wield the awesome power entrusted to us in these cases, our decisions must be based on clear and convincing evidence of parental misconduct or inability and that termination is in the best interests of the child, and not speculation about ‘the vagaries or vicissitudes that beset every family on its journey through the thickets of life.’

Id. (quoting *Shover v. Dep't of Human Res.*, 270 S.E.2d 462, 464 (Ga. App. 1980)).

D. This Court must ensure that Encarnacion Bail Romero was placed on a level playing field with other parents separated from their children after an arrest; that her child received the same opportunity as other children for family reunification before being permanently separated from his mother; and that their permanent separation was not the result of bias.

Amici freely acknowledge that they do not have access to the Circuit Court proceedings or the record before this Court. Having carefully reviewed the Circuit Court decision, we urge this Court to review the full record and consider whether Encarnacion Bail Romero’s rights were unlawfully terminated because of her immigration status. *Cf. In re W.C.*, 288 S.W.3d at 794-795 (“Because a parent’s fundamental right to raise his or her children is a fundamental liberty interest

protected by the constitutional guarantee of due process, appellate courts must examine the juvenile court’s finding of fact and conclusions of law closely.”) (internal citation omitted).

1. Was there an unreasonable balancing of obligations between the detained mother, the State, and private individuals involved in the case?

First, was Encarnacion Bail Romero denied an opportunity to attempt to reunify with her son? Did the Circuit Court impose heightened or unreasonable burdens on Ms. Bail Romero given that she was detained, did not speak English as her primary language, and had limited economic means? Did the Circuit Court appropriately identify the obligations of the State to provide reunification services once it became aware of the child’s separation from his mother? Did the Circuit Court consider whether individuals involved in the case fulfilled their obligations to notify the State of their concerns about the child’s well-being, at a time when those concerns could be addressed by child welfare authorities? Was the child’s mother given any opportunity to receive services, such as parenting classes?

The Circuit Court appears to have based its determination of abandonment, and Encarnacion Bail Romero’s fitness, on her failure to take affirmative steps to locate her son while she was jailed, after placing her son in the custody of her family. *See In re Adoption of C.M.B.R.*, Circuit Court Opinion at ¶36 (Jul. 18, 2012) (faulting Ms. Bail Romero for failing to “avail[] herself” of resources

including a public defender, who “could have provided [her] with contact information for child welfare authorities,” as well as a “volunteer at the jail who spoke Spanish”); and *id.* at ¶48 (again faulting Ms. Bail Romero for failing to use Spanish-speaking jail inmates and jail volunteers to locate her child.) Yet the Circuit Court opinion provides no indication that State child welfare authorities offered or attempted to provide Encarnacion Bail Romero with services to reunify her with her son.

Additionally, the Circuit Court does not discuss whether Jennifer or Oswaldo Velasco, Linda Davenport, or any of the other private parties who had or knew the location of Ms. Bail Romero’s son ever reported their concerns to State child welfare officials. Nor does it discuss what efforts the State made to effect reunification when it became aware of the case on October 5, 2007—the day the Mosers took Encarnacion Bail Romero’s son from the Velasco family for an overnight visit and filed a petition for adoption, *id.* at ¶39, less than six months after his mother’s arrest. Similarly, the Circuit Court’s decision does not indicate that Encarnacion Bail Romero received any services from child welfare officials in order to overcome barriers posed by her immigration status and detention. To the contrary, it appears that private individuals with an interest in the outcome of the child’s placement substituted for the role normally played by the state. *See id.* at ¶30 (testimony about the child’s condition and care was provided by Davenport

and Velasco).³ The Circuit Court’s opinion does not identify any time at which child welfare officials visited the home where Encarnacion Bail Romero had been living or the family members upon whom she depended to care for her son.

Fundamental fairness is absent in a case such as this, when a jailed, non-English speaking immigrant mother is required to know she should find rehabilitative resources such as parenting classes and to find and avail herself of such resources while private parties ignore mandatory-reporting obligations and State child welfare authorities fail to work toward reunification. In this case, it appears that the potential barriers to reunification were exacerbated by the actions

³ Davenport and Velasco appear to have played significant roles in assisting the adoptive family in gaining custody of the child, despite his mother’s lack of consent. *See Homa v. Carthage R-IX School District*, 345 S.W.3d 266, 271 (Mo. App. S.D. 2011) (Davenport admitted to the Superintendent of Schools that she visited Encarnacion Bail in jail in order to “get [Bail] to put [her son] up for adoption.”); *id.* at 272 at FN8 (“Jennifer Velasco-Hernandez . . . is the person whom Bail’s family members retained to baby-sit [Bail’s son] while Bail was incarcerated . . . Velasco-Hernandez ultimately delivered [Bail’s son] to the persons who were interested in adopting [him] and who ultimately did adopt [him]”).

of private parties and by the lack of any action by child welfare officials who learned of the mother and child's separation and may have assumed that lack of contact from the mother alleviated their responsibilities toward the family. The State's interest in preserving families would be much better served by ensuring that State actors take all necessary steps to find parents who have been separated from their children and to offer opportunities for reunification and, if needed, rehabilitation.

2. Were Encarnacion Bail Romero's actions viewed through the lens of immigration enforcement or the lens of parent-child relationships and child welfare?

At the time of her arrest, Encarnacion Bail Romero was working at a poultry processing plant, *see In re C.M.B.R.*, 332 S.W.3d 793, 801 (Mo. 2011).⁴ She also sought help from family members in the care of her children. As the Circuit Court noted, she lived with family members, *In re Adoption of C.M.B.R.*, Circuit Court Opinion at ¶14 (Jul. 18, 2012) (noting that she lived with her brother

⁴This industry has received widespread attention for hiring immigrant laborers and the dangerous working conditions and low wages paid to employees. *See Anna Williams Shavers, Welcome to the Jungle: New Immigrants in the Meatpacking and Poultry Processing Industry*, 5 J. L. Econ. & Pol'y 31, 32 (2009).

Jose before and after the birth of her son); *id.* at ¶17 (noting that she later lived with another brother). Upon her arrest, she called her sister and asked her to pick up her son from the babysitter. *Id.* at ¶20. The court, however, construed these decisions as negative factors, and appeared particularly concerned with the immigration status of these family members. *See id.* at ¶ 14 (brother was an “illegal alien”); *id.* at ¶17 (brother was “illegally in the United States”); *id.* at ¶20 (sister is “illegally in the United States”).

“There is tremendous tension and potential for inconsistency as immigration law and family law intersect.” Thronson and Sullivan, *supra* at 4. When children and parents are caught in the crosshairs of these systems, it is particularly important that courts tasked with making decisions about families and protecting the fundamental rights of parents do not allow immigration status to prejudice the proceedings. In this case, Encarnacion Bail Romero was found to have abandoned and neglected her son based on choices she made in raising him, including co-habiting with family members, co-sleeping with her son, and availing herself of informal kinship care. But in faulting the mother for these decisions, the Circuit Court appeared inordinately concerned with the immigration status of family members with whom the mother and child were living. *See, e.g., In re Adoption of C.M.B.R.*, Circuit Court Opinion at ¶ 14 (“Prior to and after the birth of her child, Ms. Romero lived with her brother Jose, an illegal alien, and

another man in a one-room apartment in Carthage, Missouri”); *id.* at ¶17 (“Ms. Romero moved in with her brother [name omitted], his girlfriend, and their three children in Carthage, Missouri. Both [brother’s name] and his girlfriend were illegally in the United States and subject to deportation”); *id.* at ¶20 (highlighting that the sister whom Encarnacion Bail Romero called after her arrest, so that her son could be picked up from the babysitter, was “illegally in the United States.”)⁵

The Circuit Court was not tasked with assessing whether Ms. Bail Romero or her family violated immigration laws. In reviewing the Circuit Court’s decision, this Court should evaluate what consideration was given to Encarnacion Bail

⁵ The Circuit Court opinion does not indicate that Encarnacion Bail Romero’s brother and his girlfriend were in immigration removal proceedings, which could lead to their deportation, but instead assumes that being “illegally” in the United States rendered them “subject to deportation.” *In re Adoption of C.M.B.R.*, Circuit Court Opinion at ¶17. In reality, the majority of unauthorized immigrants in the United States are *not* in formal immigration removal proceedings, and are therefore not at imminent risk of deportation. Thronson & Sullivan, *supra* at 14 (asserting that “most unauthorized immigrants are unlikely to face removal” and noting that millions of undocumented immigrants live stable lives in the United States).

Romero's efforts to care for her child, whether she had an opportunity to reunify with her son, and whether the State took any steps to provide reunification services.

3. What evidence exists of anti-immigrant bias or prejudice in the lower court proceedings, and did any such bias have undue influence over the proceedings?

The Circuit Court's decision contains so many references to the immigration status of both Encarnacion Bail Romero and the family members with whom she lived and who helped to care for her son, that *amici* are concerned that immigration status unduly prejudiced Encarnacion Bail Romero's right to reunify with her son or to overcome or remedy any past mistakes in caring for her son.

Most significantly, however, Encarnacion Bail Romero's parental rights were terminated in part because "her ability to parent has not substantially improved" and "has worsened, especially if she is deported to Guatemala," *see In re Adoption of C.M.B.R.*, Circuit Court Opinion at ¶78, though there is no evidence that Missouri child welfare officials endeavored to assist her in improving any alleged deficits in her parenting capabilities. Specifically, the Court found that her son would face a significant likelihood of significant harm because she is "at risk of being deported" and in Guatemala would have "few resources available to her to provide for the child's support and well-being." *See id.* at ¶103.

Amici respectfully urge this Court to determine whether the Circuit Court's decision to permanently separate Encarnacion Bail Romero from her son was prejudiced by Ms. Bail Romero's status as an unauthorized immigrant or as an immigrant parent detained by the federal government.

IV. CONCLUSION

This will not be the last case in which a parent's decision to migrate across international borders will play a role in a court's evaluation of the parent's fitness and its assessment of the best interests of that parent's children. We urge this Court to review carefully the Circuit Court record to determine whether Encarnacion Bail Romero was held to a higher standard than other parents accused of abandoning or neglecting their children, whether she was denied reunification services by the State, whether the lens of immigration enforcement clouded the child welfare analysis, and whether her rights to the care and custody of her son were undercut due to bias or prejudice toward her immigration status. We respectfully urge this Court to ensure that its decision protects the rights of all families, affording unauthorized immigrant parents the full rights to which they are entitled under the Constitution, and providing them with the same opportunities to establish their fitness, rehabilitate past mistakes, and reunify with their children.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief:
(1) contains the information required by Rule 55.03; (2) complies with the
limitations in Rule 84.06; (3) contains 6,340 words as determined using the word-
count feature of Microsoft Office Word 2010.

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