To: Uniform Child Transfer Protection Act Drafting Committee
From: Observers Courtney Joslin, UC Davis, Martin Luther King Jr. Professor of Law and Catherine Sakimura, Family Law Director, National Center for Lesbian Rights
Re: Comments on September 2020 draft
Date: September 12, 2020

Dear drafting committee,

We submit this memo for two reasons: (1) to respond to Observer Maureen Flatley's reactions to our earlier memo; and (2) to raise concerns about the Draft's return to using a subjective intent standard in Sections 202 and 203.

We recommend that other than the provisions addressing adoption, the committee limit this Act to the regulation of third parties involved in unregulated transfers and advertising.

## I. Concern about regulating actions of parents directly

The current language of Section 202 permits the removal of a child from their parent/guardian or caregiver by the state *solely* because of a belief that the parent transferred custody with an intent to permanently relinquish custody, *without any other evidence that the child is at risk of harm*.[1] Providing a basis for investigation by child protective services or the removal of children based on an apparent subjective intent of the parent is likely to lead to inappropriate removal of children from their parents, especially families of color who are not engaging in the harms this Act seeks to address. This Act is an expansion of the existing child welfare system because it provides an entirely new basis for removal that *does not require any evidence of actual harm to the child*. And, to be clear, even if it is not the intent of the Drafting Committee for this Act to be applied in so-called "public child welfare cases," this Act applies to all families and all children and creates a new basis for child welfare involvement in families.

In many situations, the Act could harm rather than help children and their families. When a parent cannot care for their child, it is important for that parent to seek out someone else who can safely care for their child while they cannot. Policy should encourage parents to take this step.[2] This Act does the opposite. It can result in penalizing the parent for making the best decision they can in the moment. For example:

- A parent who is experiencing a medical or mental health crisis should be able to ask any other responsible person to care for their child, even if they do not know when or if they will get better. It's possible that in that moment of being unsure if he or she would ever get better, the parent subjectively intended to permanently transfer custody. But this decision alone—in the absence of any evidence of abuse or neglect—should not lead to their children ending up in the child welfare system.

[1] *See* Section 202(a) ("(a) A parent or guardian of a child, or an individual with whom a child has been placed for adoption, may not transfer custody or allow a transfer of custody of the child to another person with the intent of severing the rights and responsibilities of the parent, guardian, or individual regarding the child [except for certain enumerated situations].").

[2] To the extent the parent places the child in the care of someone who cannot provide a safe home, that is already addressed by the child welfare system.

- Undocumented parents who fear deportation may plan for someone else to care for their children in the event of their deportation. They may fear they will never be able to reunited with their children if that happens. Would this be considered a subjective intent to permanently relinquish custody? While a court might ultimately conclude no, that could be years after the family was separated as a result of this Act. These families should not be permanently separated merely because the parents feared they would not be able to reunite.

- As discussed during the pre-read session, there are cultural practices among many communities of color where different people in the family or community participate in caring for the child, sometimes in permanent or semi-permanent arrangements. For example, in Black communities, kinship care both within and outside of the child welfare system is common.[3] Native Hawaiian culture has a customary practice called "hanai" where children are sent to live with others in the family or community, and this can involve a permanent transfer of custody.[4] Hanai relationships are recognized by Hawaii law in numerous ways.[5] And many Native American Tribes practice customary adoption.[6] It is difficult to say whether a judge might find some of these choices or practices to include a subjective intent to permanently relinquish custody.

- Many surrogacy arrangements involve a transfer of custody with the intent to permanently relinquish rights and may occur before the surrogate is deemed not to be a parent. This Act may also cover and penalize such transfers.

We do not believe that the committee *intends* to target or prohibit these practices. But as drafted, the Act could be interpreted—at least in the initial stages of the child welfare investigation—of applying to these and many other situations in which a parent is making a good decision on behalf of their child. And, again, while a court might ultimately conclude that some or all of these circumstances do not meet the standard in the Act, that could be many years after the family has been separated. The Act also creates a chilling effect on parent's ability to make these kinds of choices to take care of their children.

We believe there is a narrower way to address the harms of unregulated transfers, which, aside from international adoption, appear to involve third party entities for the most part. By sanctioning third parties who are involved in these transfers and prohibiting advertising, the Act can more directly address the harm of these transfers.

## II. The inclusion of an intent standard does not alleviate these concerns and raises other concerns

We believe that the intent standard in this draft act, as well as the proposed federal bills, is harmful for two reasons. First, even if a parent can ultimately prove that they did not have a subjective intent to

[3] Sonia M. Gipson Rankin, *Black Kinship Circles in the 21st Century: Survey of Recent Child Welfare Reforms and How It Impacts Black Kinship Care Families*, 12 Whittier J. Child & Fam. Advoc. 1, 3 (2013).
[4] *See Interest of AB*, 145 Haw. 498, 515-16, 454 P.3d 439, 456-57 (2019), as amended (Dec. 16, 2019)
[5] *Id.* at 516; *see also, e.g.,* Haw. Rev. Stat. Ann. § 386-2 (wrongful death).
[6] Professor Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 Cap. U. L. Rev. 239, 288 (2008).

permanently relinquish custody, if the child has been taken into custody of the state in the meantime, severe damage is already done.[7]

Second, cultural practices around custody sharing among families and communities or a parent's choice to have someone care for their child in the event of their deportation or in a health crisis may not clearly demonstrate a lack of such intent to a judge. Unconscious bias and lack of understanding of cultural practices may exacerbate this. For this reason, we fear that this standard will be disproportionately used against parents of color resulting in even more unnecessary separations of these families.

## III. The child welfare system disproportionately impacts children of color and native children today

Dorothy Roberts may have written her original work decades ago, but the problems she wrote about are not solved and continue today, as shown by both her own current scholarship and other recent studies. Nationwide, families and children of color, primarily those who are Black and Native American, are overrepresented in the child welfare system compared with their proportion of the general population.[8] As the U.S. Department of Health and Human Services wrote in 2016, there is "racial disproportionality and disparity" in the child welfare system.[9] For example, even though Black children make up only 13.8% of the child population in the United States, they represent 22.6% of children identified by the child welfare system.[10] In addition, once families of color are in the child welfare system, they "tend to have worse outcomes—such as children more likely to be removed from their homes, less likely to receive family preservation services, and in the case of African American children, experiencing longer stays in foster care."[11] In addition, parents with disabilities and LGBT parents are disproportionately

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[7] Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 Marq. L. Rev. 215, 218 (2013); *id.* at 240-243 (discussing "secondary harms" of foster care); *see also, e.g.*, Vivek Sankaran et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families* 102 Marq. L. Rev. 1161, 1165-70 (2019) (describing research showing that removal and placement of children in foster care can traumatize children and their parents).

[8] U.S. Dep't of Health & Hum. Servs., Child Welfare Info. Gateway, *Racial Disproportionality and Disparity in Child Welfare*, 2-3 (Nov. 2016), https://perma.cc/N4TQ-DWEM; C. Puzzanchera & M. Taylor, Nat'l Council of Juvenile & Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care Dashboard* (2020), http://www.ncjj.org/AFCARS/Disproportionality_Dashboard.aspx (click "Disproportionality Index: Children in, entering, and exiting foster care"); *see, e.g.*, Megan Martin & Dana Dean Connelly, Ctr. for the Study of Soc. Policy, *Achieving Racial Equity: Child Welfare Policy Strategies to Improve Outcomes for Children of Color* 4, 6 (2015), https://perma.cc/TM7J-WT7E; Ctr. for the Study of Soc. Policy et al., *Disparities and Disproportionality in Child Welfare: An Analysis of the Research* (Dec. 2011), https://perma.cc/8NM4-4AL2; Robert B. Hill, Casey-CSSP All. for Racial Equity in Child Welfare, *An Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels* (2007), https://perma.cc/6HGP-ZLA6; *see generally* Marian S. Harris, *Racial Disproportionality in Child Welfare* (2014); Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, The Imprint (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480.

[9] U.S. Dep't of Health & Hum. Servs., Child Welfare Info. Gateway, *Racial Disproportionality and Disparity in Child Welfare*, 2-3 (Nov. 2016), https://perma.cc/N4TQ-DWEM.

[10] *Id.*

[11] Megan Martin & Dana Dean Connelly, Ctr. for the Study of Soc. Policy, *Achieving Racial Equity: Child Welfare Policy Strategies to Improve Outcomes for Children of Color*, 4 (2015), https://perma.cc/TM7J-WT7E.

investigated by child protection departments and disproportionately have their children removed.[12] The Families First Act may have been a step in the right direction, but is not a panacea. The system remains deeply racist in its structure and effect.

## IV. Proposed changes

A key problem with this Act is that it uses the child welfare system as its core regulating agency. Given the existing disproportionate targeting of families of color by the child welfare system, there is good reason to think that this Act will be used to further target and penalize such families. As Observer Flatley points out, the harms intended to be addressed by this Act do not arise out of child welfare cases. But, as drafted, the Act applies to such families. The Act authorizes the child welfare system to intervene in all families and potentially remove any child from their family based on a finding or belief of a parent's subjective intent to permanently relinquish custody.

By attempting to regulate the original identified concern through the child welfare system, this Act creates the strong possibility that this Act will be applied most frequently to families of color—families who are already disproportionately targeted by the child welfare system--rather than the actual perpetrators the Committee is concerned about.

Moreover, the child welfare system doesn't have authority to regulate the core perpetrators intended to be addressed by this Act – third parties.

We believe that in addition to addressing internationally-adopted children, regulating *third party involvement* in any attempted non-judicial transfer of children, *prohibiting advertising* about such attempts, and possibly regulating guardians' attempts to transfer custody, *is reasonable*. However, we would strongly recommend limiting the Act to address solely these concerns without attempting to broadly regulate the actions and intent of individual parents, and to use a system other than child welfare system as the means of regulating such parties.

We suggest the following changes:

- Eliminate Sections 202 and 203.
- Alter Section 205 to remove child protective services as the regulating agency. 205 requires alteration because child protective services is not an appropriate agency for addressing third party involvement because they do not bring actions to enjoin third party actions and have no authority over third parties. One possible alternative is to, similar to statutes regulating payment in exchange for adoption, provide that such actions are class c misdemeanors subject to fine, although again, this should be aimed at third party entities rather than parents.
- Add a provision prohibiting third parties from placing a child or facilitating a transfer of custody outside of a regulated process such as child welfare or a judicial process, although some exceptions should be included—for example, a person helping an incapacitated parent should not be sanctioned.

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[12] Nat'l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* 72 (2012), https://perma.cc/65BC-RAJ4; *see* ADA Nat'l Network, *Parents with Disabilities in Child Welfare Agencies and Courts*, https://perma.cc/D94M-DPW5; Univ. of Minn. Sch. of Soc. Work, Ctr. for Advanced Studies in Child Welfare, *The Intersection of Child Welfare and Disability: Focus on Parents* (Fall 2013); Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 Fam. L.Q. 87, 90 n.32, 92 (2018) (citing Kathi L.H. Harp & Carrie B. Oser, *Factors Associated with Two Types of Child Custody Loss Among a Sample of African American Mothers: A Novel Approach*, 60 Soc. Sci. Res. 283, 291 (2016)).

- Section 204 should be altered to remove the reference to 202. This also requires that the definition of custody or transfer of custody make clear that babysitting/nanny services or foreign exchange students are not included.

Thank you for your attention to these concerns.