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RE: Center for the Human Rights of Children's Input for the 2021 Trafficking in Persons Report

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Via email to: TIPReportUS@state.gov

February 5, 2021

Kari Johnstone, Acting Director
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Office to Combat and Monitor Trafficking in Persons (JTIP)
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RE: Center for the Human Rights of Children's Input for the 2021 Trafficking in Persons Report

Ms. Johnstone:

We appreciate the opportunity to submit recommendations in response to the call for submissions for the 2021 Trafficking in Persons (TIP) Report. We applaud the US Government (USG) for continuing to include itself in its assessment of anti-trafficking efforts around the globe.

The Center for the Human Rights of Children (CHRC) at Loyola University Chicago School of Law was established in 2007 to pursue interdisciplinary research, outreach, education, and advocacy to address critical and complex issues affecting children and youth, locally and globally. CHRC applies a human-rights framework to issues affecting children, reaffirming the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family, including children.

The CHRC has cultivated child trafficking expertise by conducting direct legal services, developing research, serving on task forces, leading advocacy efforts and coordinating trainings in the following areas: child trafficking practices and policies (including promising practices), intersection of child trafficking and the child welfare systems, intersection of child trafficking and medical field/health systems, legal representation and advocacy for child trafficking victim, proper identification of situations as child trafficking, identification of legal needs for child trafficking victims, safe harbor laws, child-appropriate interview processes, and privacy and confidentiality in working with child trafficking survivors. To disseminate this expertise, the CHRC collaborates with a continuously expanding network of individuals and organizations on a number of anti-trafficking initiatives, both in the United States and abroad.

This submission focuses on five key recommendations for how the United States can improve its anti-trafficking efforts to protect children, prevent child trafficking, and prosecute perpetrators of child sex and labor trafficking: 1) Acknowledge and address the racial disparities of child trafficking victims in child trafficking in prevention, protection, and prosecution efforts, 2) Create

additional protections for child labor trafficking victims that are in line with child sex trafficking victims, 3) Formally recognize “forced criminality” as a type of labor trafficking, and the unique vulnerabilities of child victims of forced criminality, 4) Address indiscriminate and unlawful immigration enforcement and assessments of potential child trafficking cases at the US Southern Border, 5) Address the impact of Covid-19 and public health crisis on child trafficking cases. This submission uses the term “victim,” a legal term used to describe a wronged party, and “survivor” interchangeably. In doing so, we recognize and respect the resiliency and perseverance of all child trafficking victims.

1. The US Government Must Acknowledge and Address Racial Disparities in Child Trafficking in its Prevention, Protection, and Prosecution Efforts

Emerging research indicates a disturbing, yet predictable trend that children of color are disproportionately impacted by the crime of human trafficking in the United States.¹ For example, the Polaris Project, a non-governmental organization managing the National Human Trafficking Hotline, published data in 2020 that showed that in state of Louisiana, African American girls account for nearly 49% of child sex trafficking victims, though African American girls comprise only 19% of Louisiana’s youth population, and in King County, Washington, 84% of child sex trafficking victims are Black while Black children and adults together only comprise 7% of the general population.² The Polaris project hotline data also shows that Latinos are disproportionately represented among human trafficking victims in their database with Mexico and Central America nationalities comprising 59% of potential victims.³ Within the agriculture sector, nearly half of all labor trafficking victims were from Mexico.⁴ Data indicates that Native Americans are trafficked far more than any other racial group in the United States.⁵

Conversely, several studies have also found that African American youth constitute a disproportionate number of juvenile arrests for prostitution. For example, Los Angeles County, reported 92% of girls in the juvenile justice system identified as victims of sex trafficking are African American.⁶ Black children make up over half of juvenile prostitution arrests.⁷ These are children who should be identified as victims of child sex trafficking under the TVPA and TVPRA,

¹ Pantea Javidan, *Global Class and the Commercial-Sexual Exploitation of Children: Toward a Multi-dimensional Understanding*, 1 COLUM. J. RACE & L. 365, 380 (2012); Priscilla Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1598 (2015).

² *Racial Disparities, COVID-19, and Human Trafficking*, POLARIS PROJECT, (July 29, 2020) <https://polarisproject.org/blog/2020/07/racial-disparities-covid-19-and-human-trafficking/>.

³ POLARIS, *THE TYPOLOGY OF MODERN SLAVERY: DEFINING SEX AND LABOR TRAFFICKING IN THE UNITED STATES* 6 (2020).

⁴ POLARIS, *EXECUTIVE SUMMARY: THE LATINO FACE OF HUMAN TRAFFICKING AND EXPLOITATION IN THE UNITED STATES*, VISUAL SUMMARY 2 (2017) <https://polarisproject.org/wp-content/uploads/2017/03/Typology-of-Modern-Slavery-Summary.pdf>.

⁵ Maggie Logan, *Human Trafficking Among Native Americans: How Jurisdictional and Statutory Complexities Present Barriers to Combating Modern-Day Slavery*, 40 AM. INDIAN L. REV. 293, 294-96 (2016).

⁶ SAMANTHA DAVEY, *SNAPSHOT ON THE STATE OF BLACK WOMEN AND GIRLS: SEX TRAFFICKING IN THE U.S.*, 13 (2020).

⁷ *Id.*

yet, instead are punished and incarcerated within the juvenile justice system at disproportionately high rates.

The known risk factors for child trafficking include a history of abuse, community instability, poverty, and involvement in child welfare.⁸ Racial minorities experience these factors at a much higher rate than their white counterparts. As of 2019, 26% of black children live in poverty as opposed to white children and Asian children.⁹ Child maltreatment also occurs at higher rates in black and indigenous communities, at 14 substantiated victims per 1,000 population as of 2017.¹⁰ Black Americans make up 12% of the population, but black children are 40% of foster care cases.¹¹

Recommendation: The government should evaluate how efforts to provide health care, address economic security, and prevent child and sexual abuse intersect with anti-trafficking legislation and policy. For example, prevention efforts should include legal and policy measures to provide greater economic security, improved access to health care, and more child abuse prevention services to children and families. Both law enforcement and service providers receiving anti-trafficking funding should receive training on implicit bias and the disproportionate impact the crime of human trafficking has on children of color.

2. Create Additional Protections for Child Labor Trafficking Victims That Are in Line with Child Sex Trafficking Victims

Since 2016, TIP reports have repeatedly indicated that systemic improvements are necessary to properly identify child labor trafficking victims, to increase the prosecution of child labor trafficking perpetrators, and to provide more resources for child labor trafficking survivors. We agree with this assessment and provide the following analysis of the limitations of the way in which the TVPA and TVPRA are applied to child labor trafficking cases which result in the obstruction of proper identification of child labor trafficking cases in the US.

One of the challenges in identifying child labor trafficking cases is that under the TVPA, children must demonstrate that “force, fraud, or coercion,” occurred, with the burden of proof resting with the child.¹² “The statute explicitly provides that coercion includes threats of harm, physical restraint, perceived threats, or the abuse of the legal system, and requires that, at minimum, there is intent to subject an individual to various forms of forced labor.”¹³ Requiring child victims of labor trafficking to prove additional elements in order to receive relief inevitably denies protection to some victims whose trafficking experience may not conform to the most traditional model of trafficking.

⁸ KATE WALKER, CALIFORNIA CHILD WELFARE COUNCIL, ENDING THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, 18-20 (2013).

⁹ Deja Thomas & Richard Fry, *Prior to COVID-19, Child Poverty Rates had Reached Record Lows in U.S.*, FACTTANK (Nov. 30, 2020) <https://www.pewresearch.org/fact-tank/2020/11/30/prior-to-covid-19-child-poverty-rates-had-reached-record-lows-in-u-s>.

¹⁰ *Child Trends*, CHILD TRENDS (May 7, 2019) <https://www.childtrends.org/indicators/child-maltreatment>.

¹¹ MST Services, *Is Racial Bias Still a Problem in Child Welfare?*, MST Services (Jun. 12, 2019 4:29PM) <https://info.mstservices.com/blog/racial-bias-problem-child-welfare>.

¹² Trafficking Victims Protection Act of 2000, 18 U.S.C. §1591, 22 U.S.C. §§7101-7114 (2018).

¹³ KATHERINE KAUFKA WALTS & MARIA WOLTJEN, CTR. FOR THE HUM. RIGHTS OF CHILDREN & YOUNG CTR., ALTERNATIVE REPORT, 9 (2012) https://www.luc.edu/media/lucedu/chrc/pdfs/Alternative%20Report%20CHRC_Young_2012_06_13%20FINAL.pdf.

Moreover, the statutory elements of “force,” “fraud,” and “coercion” under the TVPA and TVPA apply to both adults and children, but do not account for developmental differences between children and adults. For example, a child often does what an adult tells them, because they are dependent on that adult for survival. In other cases, a minor may not have the developmental capacity to consent to labor or services (similar to sex trafficking) because of their age, dependency on the adult, the belief that their situation is “normal,” and other factors unique to children.

International human rights law also recognizes the disparate ways child labor trafficking victims are treated versus child sex trafficking in the US. In its 2017 Concluding Observations in response to the combined periodic review of the U.S government’s responsibilities under the Optional Protocol on the Sale of Children (OPSC), the UN Committee on the Rights of the Child explicitly recommends that the US “amend its legislation, policies and procedures to distinguish between adult and child victims of offences and provide specialized services for child victims of all offences under the Optional Protocol.”¹⁴

Recommendation: The US government should harmonize its approach to child labor trafficking with child sex trafficking. The government, via trainings and guidance to investigators, prosecutors, and judges, should encourage a subjective, developmentally informed analysis of the elements of “force,” “fraud,” or “coercion” in child labor trafficking cases, or, to eliminate these elements altogether for minors. Moreover, the US government should encourage states to include provisions to protect children from being penalized for any criminal acts they commit (“forced criminality”) as part of their trafficking, similar to Safe Harbor laws that provide child sex trafficking victims protection from being penalized for engaging in (criminal) commercial sex acts.

3) Recognize “Forced Criminality” as a Form of Labor Trafficking, and the Unique Vulnerabilities of Child Victims of Forced Criminality

Currently, the US government arbitrarily interprets when certain forms of forced labor constitute labor trafficking under the TVPA and the TVPRA. Specifically, victims of “forced criminality” are not always included under this definition. As a result, this leaves an entire cohort of victims entitled to protections under the TVPA and TVPRA without the protection or remedies they should be afforded under both federal and international law. According to the Department of State’s own definition, forced criminality occurs when traffickers compel victims to commit crimes during their trafficking.¹⁵ The US government has signed on to the Optional Protocol on the Involvement of Children in Armed Conflict (OPCAC), which defines participation in armed conflict as a form of human trafficking.¹⁶ The International Labor Organization (ILO) Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor also

¹⁴ Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Report Submitted by the United States of America Under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 10 (2017).

¹⁵ Office to Monitor and Combat Trafficking in Persons, *The Use of Forced Criminality: Victims Hidden Behind the Crime* (2014) <https://2009-2017.state.gov/documents/organization/233938.pdf>.

¹⁶ Optional Protocol on the Involvement of Children in Armed Conflict, art. 2, July 5, 2000, S. Treaty Doc. No. 106-37(A).

recognizes forced criminality as a form of labor trafficking and exploitation.¹⁷ Adults and children are trafficked and forced to commit crimes such as prostitution, cannabis cultivation, drug transportation/trafficking, benefit fraud, theft, forced begging, and other criminal acts.¹⁸ Yet, how law enforcement treats children who are involved in crimes induced by the adults who control them (“forced criminality”) often does not align with international anti-trafficking norms or the policy intentions of the TVPA or TVPRA. Instead, child labor trafficking victims engaged in forced criminality are often subject to criminal liability despite coercion by an adult to perform these acts.

Prior to the enactment of the TVPA, many legal norms and laws treated children engaged in commercial sex acts, even if controlled by adults, as perpetrators of crime. For example, every state had a “juvenile prostitution” criminal statute on its books, presuming children were able to consent to these crimes. However, the TVPA changed this paradigm and recognized that children engaged in these criminal acts should not be treated as perpetrators of crime, but instead as victims. The definition of sex trafficking under the TVPA and TVPRA (2003) presumed that children are less likely to have the ability to identify and evaluate their options, or “consent” to sex trafficking, and thus removed the criteria to prove “force,” “fraud,” and “coercion” for minors under the age of 18.

A 2010 Department of Justice report states: “[t]he sexual abuse and exploitation of children rob the victims of their childhood, irrevocably interfering with their emotional and psychological development. Ensuring that all children come of age without being disturbed by sexual trauma or exploitation is more than a criminal justice issue, it is a societal issue.”¹⁹ The statement infers a recognition of the developmental differences between children and adults in the ability to consent to certain acts. Today, almost every state recognizes this application of a more child-centric, developmentally informed approach to sex trafficking, and have instituted “Safe Harbor” laws that protect minors engaging in prostitution and commercial sex acts from being punished as offenders or perpetrators of a crime.²⁰ While the US government recognizes that the age and development of children creates unique vulnerabilities in the context of sex trafficking and exploitation, it does not, however, apply the same analysis to child victims of other forced criminal acts.

Recommendation: The US government enforcement actions (including training, prosecutions, and protections under both criminal justice and immigration remedies) and spending on services should explicitly recognize and include “forced criminality” as a form of child labor trafficking

4) Address Indiscriminate and Unlawful Immigration Enforcement and Assessments of Potential Child Trafficking Cases at The US Southern Border

¹⁷ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, art. 3, June 17, 1999, S. Treaty Doc. No. 106-5, 2133 U.N.T.S. 182.

¹⁸ Vicky Brotherton, Victim or Criminal? Trafficking for Forced Criminal Exploitation in Europe, 1 (2014).

¹⁹ DEP’T OF JUST., THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION, 1 (2010).

²⁰ Office to Monitor and Combat Trafficking in Persons, *2020 Trafficking in Persons Report: United States*, U.S. Dep’t of State, <https://www.state.gov/reports/2020-trafficking-in-persons-report/united-states/>.

The implementation of the US government’s increased immigration enforcement under the Trump administration has curtailed identification and protection of child trafficking cases of migrants seeking safety in the US. For example, “pushback” policies of asylum seekers at the US-Mexican border prohibit child trafficking victims from accessing the protections afforded to them under both domestic and international law.²¹ Under the Migrant Protection Protocols (MPP) asylum seekers are forced to live in camps near the border which are plagued by crime, abuse, and poverty as well as over 300 cases of child kidnapping.²² All of these factors expose migrant children to increased risk of trafficking. Furthermore, under these pushback policies, such as the MPP, migrant children are deprived of due process and the obligation of non-refoulement is ignored.²³ We commend the current administration for publicly committing to reverse this policy.

The screening mechanisms used by US Customs and Border Protection (CBP) to assess unaccompanied minors’ eligibility for protection in the US is not child-centric, and often fails to correctly identify child trafficking cases. More recently, the CBP’s “Turnback Policy” requires no formal process to prevent migrants from seeking asylum and allows CBP agents to arbitrarily prohibit asylum seekers.²⁴ The mechanism does not account for the high frequency of migrant children who have suffered from trafficking and other violence, who are being turned away from the US and denied protection.²⁵

Title 42, the policy authorizing the expulsion of all undocumented noncitizens appearing at the border under the guise of preventing the spread of Covid-19, further deprives vulnerable children of their legal protections and increases vulnerability to human trafficking. by failing to screen asylum seeking children for fears of safety and prosecution, including human trafficking.²⁶ Unaccompanied children detained in undisclosed hotels and other locations were placed at grave risk of abuse and possibly trafficking, in addition to being removed from the country without any due process or consideration for their safety and possible trafficking.²⁷ This failure to assess and protect children directly undermines the TVPA, TVPRA, and the Optional Protocol on the Sale of Children (OPSC).²⁸

Recommendation: The US government should reverse the pushback policies, including MPP, Title 42, and develop a legal framework that protects migrant children and reduces their vulnerability to human trafficking. The US government should institute developmentally informed and child-centric screening process for human trafficking to enable the government to more successfully identify child trafficking cases. Public health crisis or other emergencies should never

²¹ Katherine Kaufka Walts, et al., Ctr. for the Hum. Rights of Children, *Submitted Input to the Special Rapporteur for the Human Rights of Migrants*, Loyola University Chicago (Feb. 1, 2020) <https://www.luc.edu/media/lucedu/chrc/pdfs/Input-Special-Rapporteur-for-the-Human-Rights-of-Migrants.pdf>.

²² *Id.* at 4.

²³ *Id.* at 5.

²⁴ *Id.* at 8.

²⁵ Brief of Young Center for Immigrant Children’s Rights et al. as *Amicus Curiae*, at 10, *Wolf v. Innovation Law Lab*, No. 19-1212, 141 S.Ct. 617 (Jan. 22, 2021).

²⁶ *Id.* at 6.

²⁷ *Id.*

²⁸ Kids in Need of Defense, *Family Separation: Two Years Later, The Crisis Continues* 13 (2020).

be a reason to roll-back protections for children, especially those who are at risk of human trafficking.

5) Address the Impact of Covid-19 On Child Trafficking Cases

Due to shelter in place and social distancing orders, child trafficking victims face heightened barriers to obtaining protection and services. The frequency of victimization will likely increase in this context. Children are less visible to a range of professionals who regularly engage with children, including teachers, pediatricians, community members, and faith leaders. For example, by closing schools and requiring remote learning, COVID-19 has increased their potential for online exploitation and exposed weaknesses in efforts to protect children from ²⁹

The increased use of online platforms for both learning and to connect with peers has provided traffickers more opportunities to contact and groom children, particularly younger children who have less experience with online platform³⁰ The easier access to children through online platforms coupled with limited access to support services, creates a ripe environment for increased online child exploitation.³¹ This heightened vulnerability is especially prominent for at risk families, such as those who have lost employment or have fewer childcare options while working from home and are unable to supervise their children's time online.³²

COVID-19 has also exacerbated racial and economic disparities within the United States, putting children of color at an even greater risk of trafficking than the already disproportionate risk they faced, as discussed above.³³ In addition to general racial and economic disparities exacerbated by the COVID-19 pandemic,³⁴ Native Americans, particularly those living on tribal land, have been disproportionately impacted by COVID-19 in a manner that will only serve to further exacerbate disparities in poverty, child abuse, and human trafficking.³⁵ These are the same issues that make children more vulnerable to trafficking: when their families lack resources like health care, employment, education and food. As has been noted by organizations like the Polaris Project and the American Psychological Association, traffickers tend to target those who are most marginalized in society. This includes racial minorities who often experience higher levels of

²⁹ LIVIA WAGNER & THI HOANG, AGGRAVATING CIRCUMSTANCES: HOW CORONAVIRUS IMPACTS HUMAN TRAFFICKING (2020) <https://globalinitiative.net/analysis/human-trafficking-covid-impact/>.

³⁰ *Id.*; *School Closings Due to COVID-19 Present Potential for Increased Risk of Child Exploitation*, FBI (Mar. 23, 2020) <https://www.fbi.gov/news/pressrel/press-releases/school-closings-due-to-covid-19-present-potential-for-increased-risk-of-child-exploitation>.

³¹ *INTERPOL Report Highlights Impact of COVID-19 on Child Sexual Abuse*, Interpol (Sept. 7, 2020) <https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-report-highlights-impact-of-COVID-19-on-child-sexual-abuse>.

³² *Id.*

³³ Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality*, ECONOMIC POLICY INSTITUTE (June 1, 2020) <https://www.epi.org/publication/black-workers-covid/>; LIVIA WAGNER & THI HOANG, AGGRAVATING CIRCUMSTANCES: HOW CORONAVIRUS IMPACTS HUMAN TRAFFICKING (2020) <https://globalinitiative.net/analysis/human-trafficking-covid-impact/>.

³⁴ J.M. Carethers, *Insights into Disparities Observed with COVID-19*, *J. of Intern. Med.*, (Nov. 8, 2020) <https://onlinelibrary.wiley.com/doi/10.1111/joim.13199>.

³⁵ Elizabeth Hoover, *Native Food Systems Impacted by COVID*, *Agric. Hum. Values* 569, 570 (May 11, 2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7212726/>.

poverty that make them susceptible to exploitation. The pandemic exacerbated these vulnerabilities and highlighted the urgent need to address them thoroughly.

Recommendation: Conduct research and analysis on the impact of COVID-19 on child trafficking victims, and identify new ways to provide support services to vulnerable children and families who may be isolated due to Covid-19 and future public health crisis.

Thank you for the opportunity to submit our input and recommendations. If you have any further questions, please contact me at kkaufkawalts@luc.edu.

Sincerely,



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