To: ERUCA drafting committee
From: Courtney Joslin and Cathy Sakimura, Observers
RE: 1/8/21 draft
DATE: 1/12/21

Thank you so much for all the work on this new draft. We greatly appreciate the thoughtfulness that went into these changes and the direction of this draft. We have a few specific comments for consideration prior to the meeting.

Section 2(3)
We worry that under the current language a party might be able successfully to argue that contributions that were not clearly intended for the benefit of the other cohabitant or for the relationship do not constitute "Contributions to the relationship." To address this concern, we propose the following addition:

> "Contributions to the relationship" means contributions of a cohabitant to or for the benefit of the other cohabitant, both of the cohabitants jointly, or the cohabitants' relationship, whether those contributions are in the form of efforts, activities, services, or property. The term includes domestic services, such as cooking, cleaning, shopping, household maintenance, and conducting errands for the benefit of the other cohabitant or the cohabitants' relationship, and otherwise caring for the other cohabitant, a joint child, or a family member of the cohabitant. The term does not include sexual services.

Section 5
We are concerned that this Section could be read as only prohibiting a court from completely denying the availability of contractual or equitable claims. Under such a reading, the court would not be prohibited from imposing additional requirements on people who are cohabitants because they are cohabitants. To address this concern, we suggest going back to language similar to what was included in earlier drafts:

> Except as otherwise provided under this [act], a contractual or equitable claim shall not be restricted or barred because the parties are or were cohabitants, and the individuals may not be subjected to additional procedural or substantive hurdles because the individuals are or were cohabitants.

Section 6(a)
We are concerned that "may" could be read to mean that a court has discretion to determine whether contributions to the relationship are consideration. We suggest the following language:

> (a) Contributions to the relationship ~~may provide~~ are sufficient to constitute consideration for a cohabitants' agreement.

Section 7
We are not opposed to this new approach generally, but we think that some changes may be needed to ensure that the remedy is meaningful. Among other things, currently, it is not clear that this claim

is distinct from and in addition to existing equitable claims. Here are some general suggestions to address these concerns:

- It would be clearer if this claim had a name, like "cohabitant's claim in equity." (We offer this merely as a suggestion. We're not wedded this name; we just think a name would be helpful.)
- We think it would be helpful if the section somehow communicated that this claim is distinct from and in addition to existing equitable remedies.
- It would be helpful to clarify that this is intended to be a more robust remedy than existing remedies where that is needed for a just result.
- For (c)(1), we suggest adding the clause "of the contributions provided" or "of the services provided." Otherwise, the subsection could be read to refer to the market value of the asset.
- We are concerned about subsection (c)(2). We are worried that, in practice, the inclusion of this factor will result in parties losing unless they have a written or oral agreement regarding their property and debt. (This would be contrary to our understanding of the purpose of this Section. We understand that this Section is included to provide justice in the absence of an agreement.) Evidence of an "intent to share property" is not required under most existing similar schemes. For example, it is not required under Washington State's committed intimate relationship test, or the ALI factors. Instead, what these tests require is intent to mutually support each other, or evidence that the parties pooled resources. We strongly favor something more along those lines.
- We understand why the factors in the second half of (c)(3) were included. But while we understand why one might take the position that a court should be more inclined to give relief to an older, less healthy person under this provision, we are somewhat concerned that the inclusion of this age/stage of life language may used as a basis for denying relief to an otherwise deserving younger, healthy person. We're not sure it could help (or hurt) to split subsection (3) into two subsections. We will note that neither the Washington test nor the ALI principles include factors related to the age, stage of life, and physical and mental condition of the cohabitants.

Section 9

Of the three options, we strongly support option A. The other two options (B & C) require people to take steps that many (maybe, most) people do not take. Options B and C would result in cutting off any form of relief for many same-sex couples who were only recently able to marry with respect to property that was accumulated during what could have been decades of premarital cohabitation.

There may be other options that could work, like explicitly allowing division of pre-marital assets in the divorce (for states that do not do so already), but this would require a bracketed option for community property states treating it as quasi community property.