**To: Commissioner Lehrman and Reporter Atkinson**
**From: Cathy Sakimura, National Center for Lesbian Rights (Observer)**
**Re: "Harm" standard and discussion of *Troxel* in Comments and Legislative Notes**

Thank you to the Chair and Reporter for the memo summarizing the discussion of the Committee in July 2017, and for all of your work on this Act. I write to express our concern that the Comments, Legislative Notes, and Prefatory Note in the draft overstate the effect of *Troxel* and state decisions interpreting *Troxel*. For the reasons outlined below, we recommend 1) deleting the Legislative Notes in Sections 106, 107, and 112 stating that a state may wish to substitute "harm" for the word "detriment," and 2) editing the discussion of *Troxel* in the Comments and Prefatory Note to reduce the focus on the few states that have required harm and add more information about states that have not.

First, we recommend against a Legislative Note that a state may need to change the standard in Sections 106, 107, and 112 from "detriment" to "harm" to avoid enacting an unconstitutional statute. Instead, the statute should merely provide that detriment must be shown without brackets or commentary. We feel that this note is not necessary because a showing of detriment is constitutional under existing state decisions, and such a note will likely undermine enactability.

The standard in the Act is currently already higher than is constitutionally required in most states, as most states do not require detriment or harm for visitation claims brought by grandparents (or other third parties) who do not have a prior caregiving relationship. Only a small minority of states have held that grandparent visitation statutes are unconstitutional unless "harm" is shown. As we noted in an earlier memo, the vast majority of states already affirmatively allow a person who has a bonded parental relationship with a child to seek custody or visitation without a showing of harm or even detriment.

The current standard in the Act requiring a showing of "detriment" by clear and convincing evidence does not violate the constitutional standards in the cases cited in the Comment to Section 106. None of these cited cases invalidate statutes that require a showing of "detriment." And nothing in these cases indicate that such a requirement would not be constitutional, with the possible exception of Connecticut, which appears to require unfitness or inability of the parent to provide care. Nothing in these cases requires use of the specific word "harm." Indeed, the Florida cases indicate that a finding of either detriment or harm would be sufficient, using the terms interchangeably. *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004) is part of a series of cases invalidating different portions of Florida's grandparent visitation statute, and two of these cases require a finding of either harm or detriment. *Beagle v. Beagle*, 678 So. 2d 1271, 1277 (Fla. 1996) ("We hold that, in the absence of an explicit requirement of harm or detriment, the challenged paragraph is facially flawed."); *Richardson v. Richardson*, 766 So. 2d 1036, 1043 (Fla. 2000) (finding another subsection unconstitutional because it does not require a finding of "detriment").

Additionally, these cases do not use a common definition for the term "harm" – indeed, several of these cases discuss harm in the context of the inherent harm caused when a significant relationship in a child's life is severed, rather than harm caused by deficiency or unfitness of the parents. In *Blixt* 6 *v. Blixt,* 437 Mass. 649, 774 N.E.2d 1052 (2002), the Court used the term "harm" to mean primarily the inherent harm to the child caused by losing an existing bonded

relationship. *Id.* at 658 ("The requirement of significant harm presupposes proof of a showing of a significant preexisting relationship between the grandparent and the child."). See also *In re Parentage of C.A.M.A*., 154 Wash. 2d 52, 64 109 P.3d 405 (2005) (explaining "harm" in the context of protecting an existing substantial relationship).

The term "detriment" may need to be defined differently by different states, but this could be done through case law as necessary – it need not be done by statute. Detriment is a more flexible term that can be used by more states with varying constitutional interpretations, and is already present in many third party visitation statutes. The current language of the Act is sufficient to meet the more stringent requirements even in these states, so we urge the Committee to remove this Legislative Note.

Second, we feel that the discussion of *Troxel* and related cases in the Prefatory Note and Comments to Sections 106 and 112 is unnecessarily negative, making it appear as though the Uniform Act is likely unconstitutional. We recommend adding to the Prefatory Note that the majority of the justices in *Troxel* agreed that someone who is a *de facto* parent should be able to seek custody or visitation. We also recommend reducing the extensive discussion of *Troxel* and other cases discussing that "harm" is required in the Comments, and adding in more information about the many states that have not required harm. The comments are focused on a small minority of states that have taken positions out of step with the remainder of the country.

In particular, we suggest removing *Weldon v. Ballow*, 200 So. 3d 654 (Ala. Civ. App. 2015), *cert. denied sub nom. Ex parte Strange*, 200 So. 3d 675 (Ala. 2016) from the list of seven states that require harm. *Weldon* merely struck down the existing statute, which allowed grandparent visitation if they could overcome a rebuttable presumption that the parents' decision served the best interests of the child "[w]ithout resolving the question of the correct constitutional standard." *Id.* at p. 671. *Weldon* did not explicitly adopt the "harm" standard. Additionally, the Alabama Supreme Court case it relied on, *Ex parte E.R.G.*, 73 So. 3d 634 (Ala. 2011) was a plurality opinion that also did not resolve the question of what standard would be constitutional.