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Dear Members of the ACT 156 Task Force on Parentage Law:

On behalf of Family Equality, I write in support of the inclusion of the 2017 Article 9 in the Draft Uniform Law on Parentage (ULP) as considered by the Birth Heritage Permitted Interaction Group (BH-PIG). For the wellbeing of LGBTQ+ families, Hawaii should enact comprehensive parentage protections that are the same or substantially similar to the 2017 Uniform Parentage Act, including Article 9 as originally drafted prior to the 2024 revision.

Family Equality is a national organization that advocates to advance legal and lived equality for lesbian, gay, bisexual, transgender, and queer (LGBTQ+) families and those who wish to form them. We have been advancing this mission for over 40 years, and we support many families across the United States, including in Hawaii. One of our priority areas is family formation and protection, which includes parentage protections for LGBTQ+ families.

Family Equality is an ardent supporter of the 2017 Uniform Parentage Act (UPA) including the 2017 version of Article 9. We are concerned that the revised Article 9 (2024) treats LGBTQ+ families as exceptional and infringes on reproductive freedom at a time when reproductive autonomy is under attack. We view the regulation of gametes and the disclosure of gamete provider identifying information as distinct from adoption record disclosure requirements. We believe that it is premature for Hawaii to include the newest limitation on assisted reproduction without a thorough examination of the practical considerations and legal consequences on affected communities in Colorado, the only state to have eliminated anonymous donation. Finally, Family Equality stresses that any law regulating gamete provision, whether the 2017 or 2024 Article 9, should only be considered when Hawaii has enacted, or will simultaneously enact, comprehensive parentage protections.

A. Mandatory identity disclosure, as 2024 Article 9 requires, exceptionalizes LGBTQ+ families and undermines parent-child relationships without addressing the harm experienced by late-discovery donor-conceived individuals.

Mandating identity disclosure imposes a reproductive precondition on LGBTQ+ families and others who rely on donor gametes, singling them out for unequal treatment. We do not see this requirement in any other procreative setting. Many adults conceive via heterosexual intercourse without knowing much about their partners. Some may not have contact information or other personal data for the individual who contributed half of their offspring's genetics. We do not allow governmental intrusion on the procreative choices of these individuals and yet, by effectively eliminating anonymous donation, this is what 2024 Article 9 proposes for LGBTQ+ families who use assisted reproduction.

Treating LGBTQ+ families created by assisted reproduction as exceptional impacts their legal and social standing. The emphasis on the identity of the gamete provider risks implying that the "real" parent is the one who shares a genetic connection with the resulting child. This undermines children's relationships with their parents, particularly those who do not share a genetic connection. While the push to require identity disclosure may not arise from a desire to create a second-class notion of family

for single and LGBTQ+ parents who use assisted reproduction, focusing on the supposed importance of the gamete provider's identity can do exactly that. This raises the question of whether a 2024 Article 9 inclusion in Hawaii will be used to spur nationwide momentum for a gamete regulation scheme that, intentionally or inadvertently, prioritizes biogenetic connection at the expense of LGBTQ+ families.

Some organizations position themselves as the voice for all donor conceived individuals. However, the donor conceived community is not a monolith, and these organizations cannot, and do not, speak for all who are donor-conceived or whose families were created through gamete provision. Indeed, many who are vocal in these organizations are people whose conception stories were kept hidden from them by their parents. Such secrecy contributes to feelings of betrayal and shame. Government regulation of gamete provision, including requiring identity disclosure, does not address this harm because the government cannot mandate parental transparency. If a different-sex couple conceives a child using donor gametes from a donor required to shed anonymity when the child turns 18, and if that couple withholds from the child their conception narrative, then that child will not know to ask a bank or clinic for identifying information when they reach majority. When or if the donor-conceived individual learns the truth, perhaps through direct-to-consumer DNA testing, they are likely to feel the same parental betrayal despite the Article 9 mandate. Notably, because lesbians and single women are most likely to use donor sperm to conceive,[1] such secrecy-based harm is unlikely to occur in the majority of families who use donor sperm today.

B. Eliminating the ability of gamete donors to opt out of identity disclosure effectively prohibits the use of anonymous donor gametes, constituting significant government overreach and jeopardizing reproductive autonomy at a time when reproductive freedom is under attack.

When considering whether Hawaii should adopt the 2017 or 2024 version of Article 9, it is important to examine the context in which this question arises. At Family Equality, we recognize the deeply interrelated nature of reproductive freedom and full equality for those who are LGBTQ+. Two years ago, the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* sent shockwaves throughout the LGBTQ+ community when it reversed almost 50 years of established precedent. This decision had, and continues to have, a significant impact on the LGBTQ+ community, limiting LGBTQ+ individuals' ability to obtain necessary medical care relating to when, whether, and how to have children.

Today, these efforts go even further, attempting to regulate gametes in a way that undermines reproductive freedom and privacy. The effective elimination of anonymous donation would impose significant restrictions on reproductive autonomy, misappropriating people's most intimate decisions. Justification provided for such governmental overreach usually focuses on the emotional adjustment and psychological well-being of donor conceived individuals. However, we do not, and should not, allow the government to restrict reproductive freedom based on whether any specific procreative choice may upset a future child. To do so could lead toward concerning social engineering and value judgments on who should be allowed to procreate.

This is not to say that child well-being does not matter. Any person who has become a parent through assisted reproduction using donor gametes is deeply invested in the well-being of their child(ren). Still, the potential for future information gathering does not outweigh the significant

[1] *See* Diego, D., Medline, A., Shandley, L., Kawwass, J. & Hipp, H.S., *Donor Sperm Recipients: fertility treatments, trends, and pregnancy outcomes,* 13 June 2022. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9464617/pdf/10815_2022_Article_2616.pdf

infringement on reproductive freedom, particularly when studies show that less than half of donor-conceived people who have access to identifying information choose to learn the donor's identity.[2]

Importantly, most banks and clinics already collect extensive information about donor health and medical information. All major banks and clinics give donors the option to choose whether to also provide identifying information to any donor-conceived persons when they turn 18. Overall, the there is a trend toward disclosing information. When coupled with the ability to obtain direct-to-consumer DNA testing, banks and clinics adopting a policy of notifying donors and intended parents of the limits of anonymity becomes advisable; however, regulating in this area is unwarranted and worrisome.

Any regulation of gametes, including the elimination of anonymous donation as included in the 2024 UPA, requires careful consideration.[3] While anonymity may not be guaranteed in today's technological world, statutorily mandating all donors to provide identifying information is a concerning response that permits significant and unnecessary government overreach into reproductive freedom and privacy.

C. Regulating gametes for assisted reproduction should not be compared to the unsealing of records in adoption cases; the two are completely different.

Several distinctions exist between gamete regulation and adoption disclosures. Some, but not all, of these distinctions include the intent of parents and donors at the time of conception, the genetic connection between a parent and a child that often exists in assisted reproduction, the availability of medical and health information for donor-conceived individuals, and perhaps most importantly, the timing of any rights creation and the impact that has on a family's procreative choices.

When a couple or an individual embarks on reproduction using donor gametes, they do so with the intent to parent any resulting child. Updated parentage laws center around this intent, which is demonstrated prior to conception. Also prior to conception, a donor demonstrates intent not to parent, usually through a written instrument. Outside of directed donation, the gamete donor does not choose recipient parents or have any say over the choices these parents make. Often, an intended parent is also the genetic and/or birthing parent of a child conceived using donor gametes. The donor-conceived child would not exist but for the efforts of their intended parents. Depending on state law, intended parents can secure legal parentage prior to birth; legal parentage attaches the moment the child is born. And, under 2017 Article 9, non-identifying medical and health history information is made available.

Unlike a donor-conceived individual, an adoptee exists completely independent from their adoptive parents' intent to parent. An adoptee is conceived and sometimes born prior to their birth parent(s)' decision to place the child for adoption. Adoptees or their parents may not have access to any medical or health history of their birth parents. An adoptee's unsealed records may or may not contain identifying information for the adoptee's birth parents.

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[2] *See* Scheib, J.E., Ruby, A. & Benward, J., *Who Requests Their Sperm Donor's Identity? The First Ten Years of Information Releases to Adults with Open-Identity Donors*, 107 FERTILITY & STERILITY 483, 486 (2017) ("[d]uring the first 10 years of possible releases [of identifying information], adults from 33.2% of eligible families (85/256) contacted the program for their donor's identity.") https://www.fertstert.org/

[3] *See, e.g.,* American Society for Reproductive Medicine, et al., *Principles on Family Formation and Recognition,* Principled Provision (2024) https://principledprovision.org/.

Importantly, creating a right-to-information claim for donor-conceived individuals prior to conception by eliminating the donor identity disclosure opt-out provision implicates reproductive freedom in a way that the unsealing of adoption records does not. The procreative rights of both the donor and the intended parents are curtailed by governmental interference. In contrast, an adoptee's claim to access records does not impact the reproductive choices of their birthing parents. In a post-*Dobbs* world, where the future of reproductive freedom is uncertain, this distinction matters. Hawaii should tread carefully.

D. <u>While it is possible for the consensus to shift to supporting the 2024 Article 9, Hawaii should wait to see how other states and communities are affected.</u>

Today, no state has passed comprehensive parentage updates that include the newest revision of Article 9. In Colorado, the only state to pass a similar law, the elimination of anonymous gamete donation has proven nearly impossible to implement. We do not yet know how Colorado's elimination of anonymous donation will impact the donor pool, what additional hurdles it might create, or the increased costs for intended parents (though we do know that at least one major bank charges $1,000 more per vial for ID Disclosure donors than for anonymous donors).[4] Access barriers like these are likely to have a disproportionate negative impact on communities who have been historically harmed—and who continue to be harmed—by practices and policies regulating reproduction. LGBTQ+ families, single parents by choice, BIPOC individuals, and people with limited income are most at risk. For these reasons, the task force should recommend that Hawaii include 2017 Article 9 in its comprehensive parentage update. If Hawaii does not choose to include the 2017 Article 9, then at the very least Hawaii should not move forward with 2024 Article 9 before conducting a thorough study of Colorado.

When considering gamete regulation, it is important to create a system in which all parties' interests are protected. Laws and regulations that require identity disclosure infringe on reproductive liberty, limit access to reproductive options, and serve to undermine the integrity, dignity, and legal security of LGBTQ+ parents, their children, and their families. Hawaii should enact the comprehensive parentage updates provided by the 2017 Uniform Parentage Act while resisting the push to become the first state to enact the 2024 Article 9.

Respectfully,

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[4] *See e.g.,* California Cryobank Pricing, https://www.cryobank.com/pricing/, last accessed August 7, 2024 (pricing anonymous donor sperm at $1,195 per vial and ID Disclosure sperm at $2,2195 per vial).