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The Honorable Andrew M. Cuomo

State Capitol

Executive Chamber

Albany, New York 12224

Dear Governor Cuomo:

On behalf of the Civil Rights Committee of the New York City Bar Association (the “City Bar”), I write to congratulate you on your election as Governor and to urge you to take this opportunity to promote legislative efforts to ensure full and adequate protection of the civil rights of all New Yorkers.

The Civil Rights Committee’s membership includes attorneys from state and local government agencies, law firms, not-for-profit organizations, and law school faculty. As its name implies, the Committee addresses civil rights issues, including the scope and enforcement of anti-discrimination laws. In this vein, we strongly support steps to modernize and enforce New York’s civil and human rights laws in the following ways:

- Expand the classes protected under the Human Rights Law to prohibit discrimination on the basis of gender identity or expression, citizenship or immigration status, domestic violence victim status, and source of income;
- Expand the relief available under the Human Rights Law, including punitive damages, civil penalties, and attorney’s fees; and
- Rescind New York’s participation in Secure Communities.¹

These reforms, many of which are already in place in New York City, and the majority of which you have demonstrated support for as Attorney General and in your campaign for Governor, would enable the State of New York—the birthplace of modern civil rights legislation—to remain a true leader in the field of civil rights.

¹ In addition, we strongly support passage of the Marriage Equality Act and the Reproductive Health Act, the substance of which will be addressed in separate letters by the City Bar’s Lesbian, Gay, Bisexual and Transgender Rights Committee and the Sex and Law Committee, respectively.

PROTECTED CLASSES UNDER THE HUMAN RIGHTS LAW

We encourage you to extend the protections of the Human Rights Law to other vulnerable classes of persons. Expansions of the Human Rights Law's protections are not unusual. Indeed, in recent years, New York has extended protection to the following types of status: religious observances and practices; sexual orientation; military status; and genetic predisposition or carrier status. New York should now join other states and jurisdictions in taking further steps to protect vulnerable people from discrimination. Specifically, we urge the following amendments:

First, the Human Rights Law should be amended to prohibit discrimination on the basis of gender identity and expression. Although the Human Rights Law currently prohibits discrimination based on sex and sexual orientation, those categories do not explicitly and adequately protect many individuals who are discriminated against because of their actual or perceived gender identity or expression, such as transgendered persons. While some trial courts have found that such persons are already protected by the Law's prohibition on sex discrimination - since discrimination on the basis of transgender status is necessarily based on failure to adhere to sex stereotypes - it is important to clarify these protections by explicitly including gender identity or expression as a prohibited basis for discrimination, as New York City has already done,² to ensure that all affected New Yorkers enjoy these protections. We therefore urge you to support Bill No. A.5710-A/S.02406-A (2009/10 Session), which would prohibit discrimination on the basis of actual or perceived gender identity or expression in employment and housing.³

Second, the Human Rights Law should be amended to prohibit discrimination in housing against victims of domestic violence, sexual assault, and stalking. It is well documented that these victims lose jobs and housing due to discrimination. Landlords often fear that the victim's presence in the housing complex will attract further violence by the abuser and harm to third parties. However, the economic security provided by housing is critical to allowing victims of domestic violence and their children to leave dangerous situations in a safe manner. Recognizing this, several states and localities (including New York City and Westchester County) have already enacted laws protecting victims of such violence from housing discrimination.⁴ Significantly, protection regarding housing discrimination would also fill a gap in the recently-reauthorized federal Violence Against Women Act, which protects domestic violence and stalking victims from discrimination in access to public and subsidized (Section 8)

² The New York City Human Rights Law was amended in 2002 to clarify that the protected class "gender" includes "a person's gender identity, self-image, appearance, behavior or expression." N.Y.C. Admin. Code § 8-102(23). Many other states and localities have also extended anti-discrimination protection to gender identity, including most recently New Jersey. *See, e.g.,* N.J. P.L. 2006, c.100 (Dec. 19, 2006). Your investigation as Attorney General into employment discrimination based on gender identity and expression under the City Human Rights Law highlighted the need for such protections statewide.

³ Assembly Bill A.5710-A / Senate Bill S.2406-A (N.Y. 2010).

⁴ North Carolina, Rhode Island, and Washington state have enacted laws prohibiting housing discrimination against victims of domestic violence. *See* N.C. Gen. Stat. §§ 42-40, 42-42.2 42-42.3 & 42-45.1; R.I. Gen. Laws §§ 34-37-1, -2, -2.4, -3 & -4; Wash. Rev. Code Ann. §§ 59.18.570, 575, 580 & 585.

housing, and which provides a defense to eviction, but does not address private housing.⁵ We therefore urge you to support Bill No. A.9020-A/S.5999-A (2009/10 Session), which would prohibit housing discrimination against victims of domestic violence.⁶

Third, the Human Rights Law should be amended to prohibit discrimination on the basis of citizenship or immigration status. New York State has long been the destination of choice for immigrants from around the world seeking a better life. But non-citizens, even those who are here lawfully - such as permanent residents, refugees, and asylees - often face discrimination, especially after the tragic events of September 11th and in light of the national debate concerning immigration reform. As you have recognized, we must address discrimination against immigrant communities.⁷ Adding citizenship or immigration status as a protected characteristic would fill gaps in the current protection offered by federal civil rights laws and the Human Rights Law, which prohibit discrimination on the basis of national origin, and the federal Immigration and Nationality Act, which prohibits discrimination based on citizenship or immigration status in employment only.⁸ New York City has already extended this protection.⁹

Fourth, and finally, the Human Rights Law should be amended to prohibit discrimination in housing on the basis of lawful source of income. As the cost of housing continues to rise, individuals with limited or fixed incomes are constantly faced with the challenge of finding safe, affordable housing. They are often denied access to housing or evicted from housing on the basis of lawful sources of income, in particular where that income comes from public sources such as Section 8 vouchers. Such discrimination by landlords reduces the already limited availability of housing for some of the most vulnerable members of New York's population, particularly people who are elderly and/or have disabilities. Such discrimination also makes it difficult for individuals attempting to transition from public assistance to self-sustaining employment, and for low-income working families struggling to find decent, affordable housing. New York State should join its own cities and counties - New York City¹⁰, Buffalo¹¹, West

⁵ See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960, amending 42 U.S.C. § 1437f(c)(9) (Section 8 housing) and 42 U.S.C. § 1437d(c) (public housing).

⁶ Assembly Bill A.9020-A / Senate Bill S.5999-A (N.Y. 2010) was vetoed last session because former Governor Paterson believed the definition of "victim of domestic violence" was overly broad. We agree with Governor Paterson that the definition should be revised in order to be consistent with the definition of "victim of domestic violence" used throughout New York State law. We are joined in our support for the bill, as revised, by the City Bar's Domestic Violence Committee.

⁷ ANDREW CUOMO, THE NEW NY AGENDA: A PLAN FOR ACTION 136-37 (2010) [hereinafter "CUOMO"], available at <http://www.andrewcuomo.com/system/storage/6/34/9/378/acbookfinal.pdf>.

⁸ While federal law bars employers from hiring undocumented workers, that is not a license permitting employers to discriminate in the treatment of undocumented workers who are hired. For example, an employer who hires an undocumented worker should not be permitted to discriminate in terms of wages or other benefits afforded workers in comparable jobs or required to be paid under law.

⁹ See N.Y.C. Admin. Code § 8-102(21) ("[T]he term 'alienage or citizenship status' means...[t]he citizenship status of any person or...[t]he immigration status of any person who is not a citizen or national of the United States"). Your widespread investigation into fraudulent practices targeting immigrant communities highlighted one example of the many ways immigrants are targeted and discriminated against because of their immigrant status, highlighting the need for statewide protection.

¹⁰ See N.Y.C. Admin. Code § 8-107(5) (prohibiting housing discrimination on the basis of lawful source of income).

Seneca¹², Hamburg¹³, and Nassau County¹⁴—and several other states such as California¹⁵, Connecticut¹⁶, Minnesota¹⁷, New Jersey¹⁸, North Dakota¹⁹, Oklahoma²⁰, Oregon²¹, Utah²², Vermont²³, and Wisconsin²⁴, in prohibiting housing discrimination based on lawful source of income.

¹¹ See Buffalo Code § 154-17 (providing protections against discrimination in housing rentals and sales based on source of income).

¹² See West Seneca Codes, Chapter 71-3 (prohibiting discrimination against a potential tenant because of the tenant's source of income).

¹³ See Hamburg Codes, Chapter 109-3 (prohibiting discrimination against a tenant because of the tenant's lawful source of income where tenant has sufficient income to cover monthly rent).

¹⁴ See Nassau County Admin. Code § 21-9.7 (prohibiting housing discrimination based on source of income).

¹⁵ See Cal. Gov. Code § 12955 (providing protections against discrimination in housing rentals and sales based on source of income). However, the availability of this protection to Section 8 voucher holders is in dispute. The statute states that “for the purposes of this section, ‘source of income’ means lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant. For the purposes of this section, a landlord is not considered a representative of a tenant.”

¹⁶ See Conn. Gen. Stat. § 46a-63(3) (prohibiting discrimination in housing rental or sales based on lawful source of income). “Lawful source of income” is defined to include “social security [SSI], housing assistance, child support, alimony or public or general assistance.” The statute was upheld by the Connecticut State Supreme Court in Comm’n on Human Rights & Opportunities v. Sullivan Associates, 739 A.2d 238 (Conn. 1999).

¹⁷ See Minn. Stat. §§ 363.01(42) & 363.0A.02 (prohibiting discrimination in housing and real property based on “status with regard to public assistance”). “Status with regard to public assistance” is defined to mean “the condition of being a recipient of federal, state or local assistance, including medical assistance, or of being a tenant receiving federal, state or local subsidies, including rental assistance or rent supplements.” However, in an unpublished opinion, a Minnesota appeals court found that the law does not extend to Section 8 voucher-holders. See Babcock v. BBY Chestnut Limited Partnership, No. CX-90-30, 2003 WL 21743771 (Minn. App. July 29, 2003).

¹⁸ See N.J. Stat. Ann. §§ 10:5-4 & 10:5-12 (prohibiting discrimination in housing rentals based on lawful sources of income “or the source of lawful income used for rental or mortgage payments”). In Franklin Tower One v. N.M., 157 N.J. 602 (1999), the New Jersey Supreme Court upheld an earlier version of the statute, N.J. Stat. Ann. § 2A:41-100 (since repealed), finding that Section 8 vouchers were covered because the statute prohibits discrimination not only against source of income but also against the source of a lawful rent payment.

¹⁹ See N.D. Cent. Code § 14-02.5-02 (prohibiting discrimination in the rental or sale of housing based on “public assistance”).

²⁰ See Okla. Stat. tit. 25, § 1452 (public assistance must be considered a valid source of income for housing; failure to consider it a valid source of income, if based on race, disability, gender or other protected categories, is unlawful).

²¹ See Or. Rev. Stat. § 659A.421(1) (prohibiting discrimination in real estate transactions based on source of income, but specifically excluding federal rent subsidy payments under 42 U.S.C. § 1437f from its definition of source of income).

²² See Utah Code Ann. §§ 57-21-2(11), 57-21-2(21) & 57-21-5 (prohibiting discrimination in housing rentals or sales based on “source of income,” defined to include “federal, state, or local subsidies, including rental assistance or rent supplements”).

²³ See Vt. Stat. Ann. tit. 9, §§ 4501(6) & 4503 (prohibiting discrimination in housing rentals or sales based upon receipt of “public assistance,” defined to include assistance “provided by federal, state or local government, including housing assistance”).

MONETARY RELIEF UNDER THE HUMAN RIGHTS LAW

Under the existing terms of the State Human Rights Law, punitive damages, attorney's fees, and penalties can be awarded only in cases of housing discrimination.²⁵ As such, in the majority of cases, whether brought administratively or in court, victims of discrimination can obtain, and perpetrators of discrimination must pay, only compensatory damages. The statutory scheme thereby provides too little deterrent to discriminatory conduct, imposes substantial burdens on victims (who must either pay for private counsel or cope with administrative delays), and fails to acknowledge the independent harm that discrimination imposes on the State and its residents.

The availability of fee awards would ease the financial burden on meritorious plaintiffs and increase their access to competent counsel, which, in turn, would impose more of the costs of enforcing the civil and human rights laws on discriminating defendants and perhaps reduce the burdens currently borne by state and local civil and human rights enforcement agencies. The availability of punitive damages in appropriate cases would more fully punish those who engage in gross misconduct and dissuade others from similar behavior. We therefore urge you to support Bill No. A.2798, which “[a]llows punitive damages to be awarded whenever a case of discrimination is established under the human rights law.”²⁶

In addition to the above-proposed amendments, the Human Rights Law should also be revised to allow for penalties to be paid to the State. Some types of discrimination cause relatively little compensable harm to direct victims, but significant harm to society as a whole—for example, a store's exclusion or disparate treatment of persons of a particular race, or an employer's use of discriminatory job advertisements. The availability of penalties would further deter discriminatory conduct and acknowledge (and compensate for) the societal harm caused by discrimination.²⁷

These changes would bring the Human Rights Law more into line with progressive civil rights statutes nationwide. Attorney's fees, punitive damages, and/or penalties are already

²⁴ See Wis. Stat. Ann. § 106.50 (prohibiting discrimination in housing sales and rentals based on lawful source of income). However, a federal court found that Section 8 vouchers are not clearly encompassed by the term “source of income,” and that participation in the Section 8 program is voluntary. *Knapp v. Eagle Property Mgm't*, 54 F.3d 1272 (7th Cir. 1995).

²⁵ See N.Y. Exec. L. § 297(9) & 297(10). Additional relief is available in housing discrimination cases because the Human Rights Law was revised previously to make it substantially equivalent to the federal Fair Housing Act.

²⁶ Assembly Bill A.2798 (N.Y. 2011) (Assembly Bill A.443 / Senate Bill S.324 in 2009/10 Session).

²⁷ While the New York Civil Rights Law provides for penalties of \$100 to \$500 for each act of discrimination, these penalties must be paid to identified victims or their assignees, not to the State. See N.Y. Civ. Rights L. § 40-d. Substantial penalties are payable to the State under the Human Rights Law only in cases of housing discrimination. See N.Y. Exec. L. § 297(4) & 297(9) (permitting assessment of up to \$100,000 in civil fines and penalties).

available in non-housing-related civil rights matters under federal law²⁸ and the laws of a number of states and localities, including jurisdictions within New York State.²⁹

SECURE COMMUNITIES

New York should decline to participate in Secure Communities. On May 10, 2010, New York enrolled in Secure Communities when the New York State Department of Criminal Justice Services signed a Memorandum of Agreement with Immigration and Customs Enforcement (ICE).³⁰ Secure Communities allows state and local law enforcement and ICE immediate access to the criminal and immigration history of an individual being booked into jail, regardless of whether the individual is ever convicted of a criminal offense. Under Secure Communities, state and local law enforcement authorities check the biometrics of an individual against Department of Homeland Security immigration databases. ICE and local law enforcement are automatically notified when an arrested person is matched to records indicating an immigration violation.

Under Secure Communities, police officers are permitted to check an individual's information in immigration databases upon booking. This is an invitation for police officers to engage in racial profiling, perhaps unwittingly, because they will be more likely to check the immigration database for those individuals who, by appearance or language, appear to be foreign-born. The risk of such consequences can create fear in immigrant communities, leading to a reluctance to report crimes or to engage with local law enforcement on important matters of public safety. As you have previously recognized, "I think they [the federal government] have to be very careful in Secure Communities, because you don't want to create a situation where people are afraid to report a crime, or afraid to testify, it could actually interfere with law enforcement and with public safety..."³¹

²⁸ Successful plaintiffs under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, for example, may receive punitive damages; 42 U.S.C. § 1988 allows for awards of reasonable attorney's fees and costs in certain federal civil rights actions.

²⁹ Both the City of New York and a number of states allow all three types of relief under appropriate circumstances. See N.Y.C. Admin. Code §§ 8-126 & 8-502; see also, e.g., Fla. Stat. §§ 760.021 & 760.11; Me. Rev. Stat. tit. 5, §§ 4613 & 4614; Mass. Gen. Laws, ch. 151B, §§ 5 & 9; Minn. Stat. §§ 363A.29 & .33; N.J. Stat. Ann. §§ 10:5-13, -14.1a, & -27.1; Vt. Stat. tit. 21, § 495b. Other state and local laws permit: (1) attorney's fees and punitive damages, see, e.g., Ill. Comp. Stat., ch. 775, § 5/10-102; Ore. Rev. Stat. § 659A.885; R.I. Gen. Laws §§ 28-5-24 & -29.1; (2) attorney's fees and penalties, see, e.g., Ariz. Rev. Stat. §§ 1472 & 1481; Cal. Gov. Code §§ 12965 & 12970; Phila., Pa., Code & Charter §§ 9-1109 & -1110; (3) attorney's fees alone, see, e.g., Conn. Gen. Stat. § 46a-104; Hawaii Rev. Stat. § 378-5; 43 Pa. Cons. Stat. § 962; Westchester County, N.Y., Laws § 700.11; or (4) civil penalties or fines alone, see, e.g., Mun. Code of Chicago, Ill., § 2-160-120; Nassau County, N.Y., Admin. Code § 21-9.9.1; N.H. Rev. Stat. § 354-A:21; S.F. Admin. Code § 12B.2.

³⁰ Memorandum of Agreement between U.S. Department of Homeland Security Immigration and Customs Enforcement and New York State Division of Criminal Justice Services (May 10, 2010), available at http://www.ice.gov/doclib/foia/secure_communities-moa/r_new_york.pdf.

³¹ More Confusion Over Secure Communities: Did NY Make a Special Deal with Washington?, VOICES THAT MUST BE HEARD, http://www.indypressny.org/nycma/voices/447/news/news_6/ (last visited Jan. 6, 2011).

By participating in Secure Communities, New York local law enforcement agencies are also expending limited resources in enforcing federal immigration law³², which prevents utilization of those resources in ways that better address our communities' needs.³³

The program also carries severe negative consequences for individuals with no criminal history or those arrested for minor violations. Though ICE maintains that the program prioritizes high-level offenders, the Immigration Policy Center stated that, in Fiscal Year 2010, only 15% of the 248,000 biometrics matches identified immigrants charged with a high-level offense, while 85% of the matches identified immigrants charged with more minor offenses.³⁴ In the event that ICE issues a detainer against an individual who has been booked into jail, the detainer may prolong the individual's detention and may limit his or her ability to access counsel or to effectively fight criminal charges. Moreover, the program has no complaint mechanisms for individuals who have been erroneously identified through the program as violating immigration laws or who have been erroneously issued detainers by ICE.³⁵ We therefore urge you to rescind New York's involvement with this program.

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On behalf of the Civil Rights Committee, I thank you and your staff for taking the time to read these recommendations, which address our primary concerns and which we feel require immediate attention. We look forward to working with you on other issues of concern to the Committee in the future and to a productive term.

Respectfully,



Brian J. Kreiswirth
Chair, Committee on Civil Rights

³² ICE already enforces federal immigration law, without the use of Secure Communities, by seeking to deport aliens who have prior criminal convictions. See, e.g., <http://www.ice.gov/news/library/factsheets/cap.htm> (last visited January 24, 2011); <http://www.ice.gov/news/releases/1011/101119newyork.htm> (last visited January 24, 2011).

³³ New York City is not formally participating in the Secure Communities program. Nonetheless, the City Bar, through its Criminal Courts, Immigration and Nationality Law, and Corrections Committees, is urging the New York City Council to pass legislation that would guide the New York City Department of Correction in exercising its discretion vis-à-vis ICE.

³⁴ Secure Communities: A Fact Sheet, IMMIGRATION POLICY CENTER, <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet> (last visited Jan. 6, 2011).

³⁵ See ACLU Statement on Secure Communities, ACLU, <http://www.aclu.org/immigrants-rights/aclu-statement-secure-communities> (last visited Jan. 6, 2011); Secure Communities: A Fact Sheet, IMMIGRATION POLICY CENTER, <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet> (last visited Jan. 6, 2011). Although ICE directs individuals who believe they have faced racial profiling or suffered a due process violation to contact the DHS Office of Civil Rights and Civil Liberties, there is no mechanism available for individuals to report errors in DHS databases or subsequent matches.