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CITY BAR

COMMITTEE ON
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By Electronic Mail

Hon. Andrea Stewart-Cousins
Majority Leader
New York State Senate
Legislative Office Building 907
Albany, NY 12247

Hon. Carl E. Heastie
Speaker
New York State Assembly
Legislative Office Building 932
Albany, NY 12248

Hon. Jessica Ramos
New York State Senate
Legislative Office Building 946
Albany, NY 12247

Hon. Richard N. Gottfried
New York State Assembly
Legislative Office Building 822
Albany, NY 12248

Re: New York City Bar Association Support of the Survivors of Trafficking Attaining Relief Together (START) Act, A.6983-A (AM Gottfried) / S.4981-A (Sen. Ramos)

Dear Majority Leader Stewart-Cousins, Speaker Heastie, Senator Ramos, and Assembly Member Gottfried:

The New York City Bar Association expresses our support for A.6983-A (AM Gottfried) / S.4981-A (Sen. Ramos), the Survivors of Trafficking Attaining Relief Together (START) Act and urges the New York State Senate and New York State Assembly to pass this legislation during the current session in order to close gaps in the existing criminal procedure law. The START Act provides more comprehensive post-conviction relief to survivors of sex and labor trafficking – relief that is critical to mitigating the long-term impacts of exploitation.

This letter is submitted on behalf of the New York City Bar Association's International Human Rights Committee, which is comprised of attorneys in private practice, government service, non-profit practice, and academia. The Committee is committed to strengthening the rule of law across the globe and has a long history of promotion of human rights standards both inside and outside of the United States. The City Bar has submitted to the Legislature a report in support of the START Act on behalf of our Criminal Courts, Sex and Law, Immigration and Nationality

Law, and Corrections and Community Reentry Committees, a copy of which is attached hereto.¹ This letter serves to supplement the City Bar’s support for the bill by highlighting the ways in which its passage will align New York’s criminal procedure law with human rights guidance on protecting human trafficking survivors.

I. BACKGROUND

The START Act is a criminal record relief bill that provides a more complete remedy to human trafficking survivors by allowing them to clear all criminal convictions resulting from being trafficked. Currently under criminal procedure statute CPL 440.10, New York allows survivors of trafficking to clear only a narrow subset of convictions resulting from prostitution-related charges, providing incomplete relief for many survivors and completely excluding others. The START Act eliminates this arrest charge limitation as a bar to relief.

The Act also provides for the more efficient resolution of multi-jurisdictional cases, whereby convictions in different New York jurisdictions can be resolved through a single motion for relief, rather than filing a motion in each county where a conviction occurred. Under the current procedure, survivors with such criminal records have to resolve each criminal conviction in a different court, an unnecessary waste of time and resources. Instead, this simple procedural amendment will greatly enhance judicial economy. In addition, the START Act provides greater protections for survivors by ensuring the confidentiality of the motion and related documents, effectively placing such documents under court seal, and conforms the statute to federal immigration case law, which enables survivors to also benefit from immigration relief as a result of successfully vacating their convictions under CPL 440.10.

The START Act is a key piece of legislation that will help eliminate the detrimental effects of a criminal record for trafficking survivors. Among many other life-long, negative effects,² a criminal record limits a survivor’s access to housing, employment, education, and financial resources.³ When such barriers are imposed on trafficking survivors, survivors are rendered increasingly vulnerable to further exploitation and, as such, these criminal records may result in a survivor being returned to the situation in which they were originally trafficked and then re-exploited. Additionally, a criminal record can have severe immigration consequences, including

¹ NEW YORK CITY BAR ASSOCIATION, REPORT ON LEGISLATION, https://s3.amazonaws.com/documents.nycbar.org/files/2019545-Vacating_SexTrafficking_Convictions.pdf

² See POLARIS ET AL., STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAWS FOR SURVIVORS OF HUMAN TRAFFICKING 5–6, <https://polarisproject.org/wp-content/uploads/2019/03/Grading-Criminal-Record-Relief-Laws-for-Survivors-of-Human-Trafficking.pdf> (explaining the impact a criminal record has on a survivor, including “the ability of parents to retain custody of their children,” the ability of an individual to access to government benefits, and, in cases of felony convictions, the right an individual has to vote).

³ Criminal records affect these areas of a survivor’s life because employers, educational institutions, and landlords commonly run background checks; as a recent Polaris report explains, this background check “can result in the automatic elimination of individuals who have a criminal history from the applicant pool”; schools, employers, and landlords may never consider or accept applicants with criminal records. *Id.* Polaris reports that a “criminal record reduces job callbacks by approximately 50 percent.” *Id.* Tellingly, in a “survey of 130 survivors, 73 percent of respondents reported losing or not receiving employment because of their criminal records. Furthermore, 58 percent of respondents suffered barriers to accessing safe and affordable housing due to their past criminal convictions.” *Id.*

possible deportation and the inability to adjust immigration status or become a citizen.⁴ These records stigmatize survivors for acts they were compelled to commit and create barriers to their psychosocial recovery.

II. THE INTERNATIONAL HUMAN RIGHTS PERSPECTIVE

In addition to the concerns noted above regarding the impacts of criminal convictions under New York state law, trafficking in all its forms constitutes a grievous violation of human rights. Trafficking infringes on, among other rights, the right to life; right to liberty and security; right to freedom of movement; and right not to be subjected to torture and/or cruel, inhuman, or degrading treatment or punishment.⁵ States must provide redress for these human rights violations by ensuring survivors receive “adequate, effective and prompt reparation for harm suffered.”⁶ Such remedy and reparation naturally does not tolerate the detention and criminalization of survivors.

Thus, alongside the obligations of states to protect trafficking survivors and to provide them with fair and appropriate remedy, human rights guidance unwaveringly advances the principle of the non-criminalization of trafficking victims.⁷ This guidance indicates that “protection and support should be extended to all trafficked persons without discrimination”⁸ and that legislation should “prevent[] trafficked persons from being prosecuted, detained or punished . . . for the activities they are involved in as a direct consequence of their situation as trafficked persons.”⁹ Likewise, children who are victims of trafficking should never be “subjected to

⁴ *Id.*

⁵ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); *See also Human Trafficking: A Human Rights Violation*, LABORATORY TO COMBAT HUMAN TRAFFICKING (Dec. 10, 2018), <https://polarisproject.org/wp-content/uploads/2019/03/Grading-Criminal-Record-Relief-Laws-for-Survivors-of-Human-Trafficking.pdf>.

⁶ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, OHCHR (Dec. 16, 2005), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>. Protocol 9 of the international anti-human trafficking protocol, which the U.S. has signed and ratified, also indicates that states must establish policies and programs to “protect victims of trafficking in persons, especially women and children, from revictimization.” *See* UNODC, UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO (2004), <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>; *12. a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, U.N.T.S., https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en.

⁷ *See* OHCHR, THE RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING, available at <https://www.ohchr.org/Documents/Publications/Traffickingen.pdf>; *see also* OHCHR, HUMAN RIGHTS AND HUMAN TRAFFICKING (2014), https://www.ohchr.org/Documents/Publications/FS36_en.pdf. The U.S. Government endorses and incorporates this essential human rights principle of non-criminalization in federal anti-trafficking legislation, stating that survivors of trafficking “should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked.” 22 U.S.C. § 7101(b)(19) (2012).

⁸ OHCHR, THE RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING, <https://www.ohchr.org/Documents/Publications/Traffickingen.pdf> (Guideline 6).

⁹ *Id.* (Guideline 4).

criminal procedures or sanctions for offences related to their situation as trafficked persons.”¹⁰ In light of these principles, the START Act is critical to aligning New York’s criminal procedure law with human rights guidance on protecting trafficking survivors.

The START Act remedies glaring deficiencies in the existing criminal record relief act helping to alleviate the life-long impact of criminal convictions on survivors. Therefore, the New York City Bar Association respectfully urges the New York State Legislature to pass the START Act.

Respectfully,

Lauren Melkus
Chair, International Human Rights Committee

cc: Members, New York State Legislature

¹⁰ *Id.* (Guideline 9).

CONTACT

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**REPORT ON LEGISLATION BY THE
CORRECTIONS AND COMMUNITY REENTRY COMMITTEE,
CRIMINAL COURTS COMMITTEE,
IMMIGRATION AND NATIONALITY LAW COMMITTEE,
INTERNATIONAL HUMAN RIGHTS COMMITTEE
AND SEX AND LAW COMMITTEE**

**A.6983-A
S.4981-A**

**M. of A. Gottfried
Sen. Ramos**

AN ACT to amend the criminal procedure law, in relation to vacating convictions for offenses resulting from sex trafficking, labor trafficking and compelling prostitution

The Survivors of Trafficking Attaining Relief Together (START) Act

THIS BILL IS APPROVED

The New York City Bar Association’s Corrections and Community Reentry Committee, Criminal Courts Committee, Immigration and Nationality Law Committee, International Human Rights Committee and Sex and Law Committee (“the Committees”) respectfully submit this report in support of A.6983-A/S.4981-A, the Survivors of Trafficking Attaining Relief Together (START) Act (the “Bill”), which would amend CPL 440.10 to make post-conviction relief more broadly available to survivors of sex and labor trafficking.

The City Bar’s over 24,000 members include attorneys in private practice, government service, non-profit practice, and academia dedicated to improving the administration of justice.

I. INTRODUCTION

In 2010, with the enactment of Criminal Procedure Law (CPL) 440.10 (1) (i) and (6),¹ New York State became the first jurisdiction in the United States to provide a procedural mechanism for sex and labor trafficking victims to petition the court to vacate convictions and dismiss cases that resulted from having been trafficked. Under this statute, in order for a court to vacate prior convictions, the movant must establish that she or he was arrested on a charge of loitering for the purposes of engaging in a prostitution offense, prostitution or prostitution in a school zone and the

¹ Press Release, Urban Justice Center, Governor Patterson Signs First in the Nation Bill Allowing Survivors of Sex Trafficking to Clear Prostitution Convictions (Aug. 16, 2010), <http://sexworkersproject.org/press/releases/swp-press-release-20100816.html> (All websites cited in this report were last visited on June 10, 2019.)

movant's "participation in the offense" leading to arrest resulted from being trafficked.² The plain language of the current statute limits relief to those persons who were arrested on prostitution related charges, regardless of the charge for which they are ultimately convicted.³ The amendment was enacted in recognition of the dynamic that victims of human trafficking lack agency over their actions and therefore should not be unduly punished for acts committed under the coercive control of their exploiter.⁴

In order to prevail on a motion for vacatur, the movant will typically provide to the court an extensive affidavit outlining their experiences as a trafficking victim, an affirmation from the defense counsel who interviewed them and frequently letters from social workers with whom the movant has received counseling. The motion may also reference records pertaining to the prosecution and conviction of the traffickers, when available. Foreign born defendants may also supply evidence that they were issued a T-visa from the United States government, which creates a statutory presumption that they were a sex trafficking victim.⁵ In rare cases, a hearing may be held to establish the period of trafficking.⁶ Due to the traumatic experience of being trafficked, it is common for these types of motions to be filed many years after the conviction, or convictions, at issue. While there are many reasons a trafficked individual may wait years to file for relief, in many cases these motions are made because the survivor feels sufficiently stable in housing, education or employment, and after having had the benefit of therapy feels personally empowered to divulge their traumatic past to counsel and the court.

The Legal Aid Society's (LAS) Exploitation Intervention Project reports that since the creation of the statutory vacatur remedy for trafficking victims in 2010, they have filed 168 motions for 97 survivors of sex trafficking under CPL 440.10(1)(i) and have successfully vacated 1704 convictions. While this is significant relief for these survivors, the LAS estimates that 30% of their clients who are survivors of sex trafficking also have non-prostitution convictions directly related to their trafficking experience that are ineligible for relief since they do not meet the narrow statutory criteria.⁷ This highlights a significant deficiency in the current law that the Bill seeks to remedy: removing the limiting requirement that a person first be arrested on a prostitution related charge before vacatur relief can be considered. The current statute permits a court to grant relief to trafficking survivors from convictions whether for prostitution or other crimes only if he or she was arrested on a prostitution related offense, but not if arrested only on another charge. This has caused unfair results in which individuals who have been adjudicated sex trafficking victims were denied vacatur relief for offenses clearly perpetrated while under the coercive control of their

² *People v P.V.*, 2019 N.Y. Slip Op. 29126, 2019 WL 1941750, at *2 (Crim Ct, Queens County Apr. 30, 2019).

³ *Id.* at *6; *see also People v L.G.*, 41 Misc 3d 428, 442-443 (Crim Ct, Queens County 2013) (conviction on guilty plea to criminal possession of a weapon in the fourth degree vacated and case dismissed because defendant arrested on loitering for the purpose of engaging in a prostitution offense charge and defendant's participation in offense which led to weapon conviction was direct result of her actions as sex trafficking victim).

⁴ Sponsor's Letter in Support, July 20, 2010 at 10, Bill Jacket, L. 2010, ch. 332, §§ 1-5; *see also, People v L.G.*, 41 Misc 3d at 439.

⁵ CPL 440.10 (1) (ii); *People v A.B.*, 35 Misc 3d 1243(A) (Crim Ct, New York County 2012).

⁶ *People v P.V.*, 2019 N.Y. Slip Op. 29126, 2019 WL 1941750 (Crim Ct, Queens County 2019).

⁷ The Legal Aid Society, Memorandum in Support of S04981/A06983 and interview with Leigh Latimer, Supervising Attorney of The Exploitation Intervention Project, CDP.

trafficker because they were not arrested on a prostitution or loitering charge.⁸ While such “anomalous results” due to the arrest charge requirement were anticipated by Governor David Patterson when the 2010 amendment was enacted, and clearly thwart the ameliorative purpose of the statute, the legislature in 2010 only approved the more restrictive language.⁹ In contrast, California, Florida, Idaho, Indiana, Nebraska and Utah, for example, have already enacted post-relief conviction laws for trafficking survivors that do not impose a limitation based on arrest charges.¹⁰

II. RECOMMENDATION

The Committees support the proposed amendments to CPL 440.10 as they represent a significant step forward in making post-conviction relief broadly available to victims of sex and labor trafficking. Importantly, the bill removes the arrest charge limitation from operating as a bar to relief by excising all language referencing the arrest charge that led to conviction in CPL 440.10 (1) (i).

The bill also expressly renders any motion for post-conviction relief confidential and effectively under court seal, including “all pertinent papers and documents” by creating a new subsection (1) (iii). Because a movant must divulge their entire personal history as a trafficking victim, their motion papers frequently contain not only intensely personal, intimate and potentially humiliating information, they also may reveal details about their lives which must be protected from their traffickers whom the movants may still reasonably fear. Currently, movants typically request that courts regard filed motions as confidential under Civil Rights Law § 50 b. However, that statute only renders the identity of any victim of a sex offense, as defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law, as confidential. Although CPL 440.10 (1) (i) is based upon an understanding that movants are frequently victims of sex trafficking, they do not easily fit the definition of a victim of a sex offense under the laws enumerated in Civil Rights Law § 50 b. The proposed bill remedies this deficiency.

Another important addition in the bill is authorization to permit a court to consolidate judgments from various state jurisdictions to be considered in one motion. This is important, in terms of judicial economy, both in New York City, where a movant may easily have been convicted in more than one borough, and in other instances where individuals may have convictions in multiple counties statewide. Rather than filing a motion in each county where convictions occurred, movants and counsel will save time and resources by filing only one motion to address a person’s entire history of convictions while a victim of trafficking.

⁸ See *e.g.*, *People v P.V.*, 2019 N.Y. Slip Op. 29126, 2019 WL 1941750 (dismissal of assault and harassment charges denied despite finding defendant sex trafficking victim); *People v. Gonzalez*, 32 Misc. 3d 831, 835, 927 N.Y.S.2d 567 (Crim. Ct., New York County 2011) (court granted dismissal of 86 cases for trafficking survivor but denied vacatur for resisting arrest conviction lacking prostitution arrest charge).

⁹ Governor’s Approval Mem, Bill Jacket, L 2010 ch 332 (NY Assembly Bill A7670).

¹⁰ Cal. Penal Code § 236.14 (<http://bit.ly/31qgdmX>); Fla. Code § 943.0583 (<http://bit.ly/31mUHIV>); Idaho Code Ann. § 67-3014 (<http://bit.ly/31mUM6d>); Ind. Code § 35-38-10-2 (<http://bit.ly/31iDFmh>); Neb. Rev. St. § 29-3005 (<http://bit.ly/31pjjYA>); Utah Code 78B-9-104 (<http://bit.ly/31qgq9J>); see also, Erin Marsh, Brittany Anthony, Jessica Emerson and Kate Mogulescu, *State Report Cards Grading Criminal Record Relief Laws for Survivors of Human Trafficking*, <https://polarisproject.org/criminal-record-relief-laws-survivors-human-trafficking>.

Finally, the inclusion of language in CPL 440.10 (6) would have significant beneficial immigration effect. The bill seeks to amend subsection (6) to direct a court that grants the motion to “vacate the judgment on the merits because the defendant’s participation in the offense was a result of having been a victim of trafficking . . .” Federal immigration courts have previously held that CPL 440.10 “is neither an expungement statute nor a rehabilitative statute,”¹¹ and instead is a “statute authorizing vacation of a conviction based on the legal merits of the underlying proceedings.”¹² Accordingly, judgments vacated under CPL 440.10 do not constitute convictions for immigration purposes.¹³ The additional proposed language for subsection (6) would conform the statute to federal immigration case law and help preserve effective vacatur of convictions for immigration purposes.

Corrections and Community Reentry Committee
Alexander Lesman, Chair

Criminal Courts Committee
Kerry Ward, Chair

Immigration and Nationality Law Committee
Victoria F. Neilson, Chair

International Human Rights Committee
Lauren Melkus, Chair

Sex and Law Committee
Mirah E. Curzer, Co-Chair
Melissa S. Lee, Co-Chair

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¹¹ *In re Rodriguez-Ruiz*, 22 I&N. Dec. 1378, 1379 (BIA 2000).

¹² *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

¹³ *Id.*