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**REPORT BY THE COMMITTEE ON CRIMINAL JUSTICE OPERATIONS AND THE  
WORKING GROUP ON THE SEX OFFENDER REGISTRATION ACT**

**OPPOSITION TO AMENDMENTS TO THE PENAL LAW AND PUBLIC  
AUTHORITIES LAW PROPOSED IN SECTION P OF GOVERNOR  
CUOMO'S TRANSPORTATION, ECONOMIC DEVELOPMENT AND  
ENVIRONMENTAL CONSERVATION BUDGET: EXCLUSION OF INDIVIDUALS  
FROM PUBLIC TRANSPORTATION**

The New York City Bar Association (“City Bar”) appreciates the opportunity to submit comments on amendments to the Penal Law and the Public Authorities Law proposed in Governor Andrew Cuomo’s Fiscal Year 2021 Executive Budget (“Executive Budget”). The provisions would permit the Metropolitan Transportation Authority (the “MTA”) to exclude certain people from public transportation and are referred to herein as the “proposed Transit Ban.”<sup>1</sup> The City Bar, founded in 1870, has more than 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. We include among our membership lawyers in virtually every area of law practice, including those representing defendants in criminal and civil courts; lawyers in government service, human and civil rights organizations, and public defender offices; as well as judges, attorneys in large firms, small firms, solo practice, and in-house counsel at corporations.

The Sex Offender Registration Act Working Group (“SORA Working Group”) is a task force comprised of members of various City Bar committees and mental health practitioners specializing in the treatment of people accused or convicted of sex-related offenses. This report was prepared by the SORA Working Group in consultation with the City Bar’s Criminal Justice Operations Committee.

The City Bar opposes the proposed Transit Ban and urges its removal from the Executive Budget. The proposal raises substantial constitutional concerns, and, rather than furthering public safety, hinders it. A previous attempt to effectively banish people from New York City public transit was met with significant opposition from criminal defense organizations last spring and was abandoned.<sup>2</sup> The proposal in this year's Executive budget goes even further. Efforts to pass it should cease.

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<sup>1</sup> FY 2021 New York State Executive Budget, Transportation, Economic Development and Environmental Conservation Memorandum of Support, Section P, p. 19, *available at* <https://www.budget.ny.gov/pubs/archive/fy21/exec/artvii/ted-memo.pdf>. (All links in this report were last visited on March 16, 2020.)

<sup>2</sup> *See, e.g.*, Letter re: Proposed Lifetime Ban from MTA Transit System, April 8, 2019 *available at* <https://secure.oadnyc.org/neon/resource/oadnyc/files/April%208%202019%20Letter%20to%20Gov%20Cuomo%20and%20Mayor%20DeBlasio.pdf>

## **I. THE PUBLIC TRANSIT SYSTEM IS AN INTEGRAL PART OF EVERYDAY LIFE FOR NEW YORK CITY RESIDENTS.**

New York City’s public transit system is the nation’s largest,<sup>3</sup> serving more than 15 million people in the metropolitan area.<sup>4</sup> It consists of a unique network of bus, rail, and subway lines used by nearly 60% of New York City residents to commute each day (compared to an average of five percent of workers who use other systems across the country),<sup>5</sup> and by at least half of all of New Yorkers to access education, medical care, shopping, and entertainment.<sup>6</sup> Many who use public transit are low- and moderate-income individuals.<sup>7</sup> People of color and immigrants are also more likely to depend on public transit than are other New Yorkers.<sup>8</sup>

New York City is massive – comprising approximately 302 square miles – and its transit system by almost any measure is the largest in the world. Prohibiting access for any subset of New York residents will effectively maroon them in their neighborhoods, barring them from the City’s most efficient, cost-effective link to the necessities of everyday life. Forcing individuals to walk to work, to medical appointments, or to school is not a viable option in our metropolis.

## **II. THE PROPOSED TRANSIT BAN WOULD BANISH A LARGE GROUP OF INDIVIDUALS FROM ALL PUBLIC TRANSIT.<sup>9</sup>**

Continued and repeated use of the term “Sex Offender Subway Ban” by the media – and by the Governor himself in his memorandum in support of his 2021 budget<sup>10</sup> - has served to confuse the public, leading people to believe that (1) only people convicted of sex offenses are affected and that (2) subways are the only prohibited modes of public transit. In fact, the proposed Ban affects *all* public transportation – buses, subways, and rail lines – and related transit property

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<sup>3</sup> American Public Transportation Association, “2013 Public Transportation Fact Book,” p. 7 (Oct. 2013), available at <https://www.apta.com/wp-content/uploads/Resources/resources/statistics/Documents/FactBook/2013-APTA-Fact-Book.pdf>.

<sup>4</sup> Sen. Andrew Gounardes, “December 2019 Transit Report: The Ordeal of Southern Brooklyn Commuters,” p. 3 (Dec. 2019), available at [https://www.nysenate.gov/sites/default/files/article/attachment/gounardes\\_transit\\_report\\_final.pdf](https://www.nysenate.gov/sites/default/files/article/attachment/gounardes_transit_report_final.pdf)

<sup>5</sup> New York Public Transit Association, Public Transit Facts, available at <https://nytransit.org/resources/public-transit-facts>.

<sup>6</sup> See New York Public Transit Association, *Public Transit Facts* (“56% of the population of New York City uses the public transportation system”), available at <https://nytransit.org/resources/public-transit-facts>.

<sup>7</sup> Gao, Q.-L., Li, Q.-Q., Yue, Y., Zhuang, Y., Chen, Z.-P., & Kong, H. (2018). Exploring changes in the spatial distribution of the low-to-moderate income group using transit smart card data. *Computers, Environment and Urban Systems*. doi:10.1016/j.compenvurbsys.2018.02.006.

<sup>8</sup> See Monica Anderson, Pew Research Center FactTank, “Who relies on public transit in the U.S.” (April. 7, 2016), available at <https://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s/>

<sup>9</sup> See FY 2021 New York State Executive Budget, Transportation, Economic Development and Environmental Conservation Article VII Legislation, pp. 63 - 71, available at <https://www.budget.ny.gov/pubs/archive/fy21/exec/artvii/ted-bill.pdf>.

<sup>10</sup> FY 2021 New York State Executive Budget, Transportation, Economic Development and Environmental Conservation Memorandum of Support, p. 19, available at <https://www.budget.ny.gov/pubs/archive/fy21/exec/artvii/ted-memo.pdf>

(such as stations or bus stops) and can bar individuals merely *accused* of certain offenses, including both vaguely-worded sex-related violations of MTA rules and certain non-sexual assaults. The proposed legislation authorizes both judges and the MTA itself to expel New Yorkers from every part of the City’s public transit system. It permits a judge to issue an order of protection against any person charged with or convicted of unlawful sexual conduct against an MTA employee, passenger or customer, or an “assault-related” offense against an MTA employee, barring the individual from the entire transit system. It also permits the MTA itself to ban anyone alleged to have engaged in unlawful sexual conduct who has previously committed two or more Transit Authority Code of Conduct violations for related conduct. And it permits the MTA to ban any person who has been adjudicated a level three SORA registrant. A violation of the proposed Transit Ban is a class A misdemeanor.

### **III. THE PROPOSED TRANSIT BAN PRESENTS SUBSTANTIAL DUE PROCESS CONCERNS.**

The right to travel is a liberty interest protected by the Fifth Amendment, stemming from Anglo Saxon law dating to the Magna Carta. Freedom of movement cannot be proscribed without due process of law.<sup>11</sup> The proposed Transit Ban tramples this basic American value and legal imperative.<sup>12</sup> Its vague provisions do not provide constitutionally adequate notice to affected riders and punish people before final adjudication of wrongdoing.

The proposal is rife with fundamental due process violations. In criminal cases charging individuals with unlawful sexual conduct against a transit rider or MTA employee or assault on an MTA employee, the proposal permits courts to “issue temporary orders of protection against individuals with pending criminal actions . . . prohibiting them from using transit services until the final disposition of the case.”<sup>13</sup> As such, the ban violates due process by depriving individuals of liberty without giving meaningful notice of the prohibited conduct and by shifting the burden to challenge the prohibition order onto the excluded person, rather than requiring the MTA to justify the deprivation of personal liberty based on individual circumstances. If the individual goes on to be convicted of the sex-related offense or assault, the order of protection may become permanent for three years.

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<sup>11</sup> See *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

<sup>12</sup> See *id.* at 126 (1958) (“Travel. . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.”).

<sup>13</sup> FY 2021 New York State Executive Budget, Transportation, Economic Development and Environmental Conservation Memorandum of Support, Section P, at p. 19, available at <https://www.budget.ny.gov/pubs/archive/fy21/exec/artvii/ted-memo.pdf>.

The proposed legislation also violates due process by creating punishments for vague, unspecified conduct.<sup>14,15</sup> It grants to the MTA the power to administratively issue a three-year “prohibition order” to any rider alleged to have committed a sexual offense committed against a passenger, customer, or employee, where that person was previously issued two or more “Code of Conduct”<sup>16</sup> violations related to a similar offense.<sup>17</sup> The punishable conduct, however, is not clearly specified. The MTA Code of Conduct does not define conduct that is “related to a sexual offense or assault-related crime.” Instead, the punishable conduct presumably falls under the “Disorderly Conduct” subsection, which provides, in part, that a person shall not “conduct himself or herself in any manner which may cause or tend to cause annoyance, alarm or inconvenience to a reasonable person or create a breach of the peace[.]”<sup>18</sup> Under the proposed ban, only *after* the MTA determines that a person has committed a violation will that person be afforded the opportunity to be notified of what MTA considers to be an annoyance, alarm, or inconvenience. There is no way for a person to know ahead of time precisely what conduct constitutes a breach of the code and conform their behavior accordingly.<sup>19</sup>

The proposed Transit Ban also permits the MTA to issue a three-year “prohibition order” to any person previously adjudicated a Level 3 SORA registrant – no allegation of sexual conduct on public transit is required. This provision is misguided and violates due process. It would effectively permit banishment due to status rather than conduct, since there will have been no inquiry into the individual’s crime of conviction or whether it involved conduct on public transit. There will also have been no allegation of Code of Conduct violations giving rise to any inference that the individual poses a risk of such conduct. Further, there will have been no inquiry into the date of the individual’s underlying conviction. Individuals adjudicated at Level 3 must register for life, so this provision may punish individuals no matter how long ago the conviction took place. And adjudication as a Level 3 registrant does not indicate a propensity for an individual to commit transit-related sexual crimes. But the provision as proposed would nonetheless permit the MTA to issue blanket “prohibition orders” to every Level 3 registrant without notice and without a hearing.

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<sup>14</sup> Under the current regulations, the MTA does not have the authority to issue prohibition orders. See N.Y. Public Authorities Law, Art. 5, Title 9 § 1204, 5-a, available at <https://www.nysenate.gov/legislation/laws/PBA/1204>. If approved, the proposed ban would confer upon the MTA the power to administratively issue prohibition orders. If a prohibition order is violated, that constitutes a criminal offense punishable by incarceration.

<sup>15</sup> It is well-settled law that “[c]itizens must be afforded fair warning of what is prohibited so that they may act accordingly.” *People v. Nelson*, 69 N.Y.2d 302, 306 (1987), citing *Greyned v. City of Rockford*, 408 U.S. 104 (1972).

<sup>16</sup> FY 2021 New York State Executive Budget, Transportation, Economic Development and Environmental Conservation Memorandum of Support, Section P, at p. 19, available at <https://www.budget.ny.gov/pubs/archive/fy21/exec/artvii/ted-memo.pdf>.

<sup>17</sup> See FY 2021 New York State Executive Budget, Transportation, Economic Development and Environmental Conservation Article VII Legislation, pp. 65-66, available at <https://www.budget.ny.gov/pubs/archive/fy21/exec/artvii/ted-bill.pdf>.

<sup>18</sup> 21 NYCRR 1050.7, *Disorderly Conduct*, available at <http://web.mta.info/nyct/rules/rules.htm>.

<sup>19</sup> See FY 2021 New York State Executive Budget, Transportation, Economic Development and Environmental Conservation Article VII Legislation, at p. 67, available at <https://www.budget.ny.gov/pubs/archive/fy21/exec/artvii/ted-bill.pdf>.

The plan raises constitutional concerns. Banning people with past convictions (no matter for what) from the transit system implicates the fundamental constitutional right to travel, especially for individuals who have served whatever sentence was imposed upon them for their past criminal conviction, as would be the case here. Imposing the travel ban on people who have already served their sentences is tantamount to banishment, which is a form of punishment. Because it would impose a new punishment beyond the existing criminal sentence, banishment legislation could be considered an *ex post facto* punishment, which is proscribed under both the U.S. and New York State Constitutions.

#### **IV. THE PROPOSED TRANSIT BAN IS AN OVERBROAD, UNWORKABLE AND FEAR-DRIVEN REACTION TO A RELATIVELY SMALL PROBLEM.**

New York City subways and buses transport more than 2.5 billion riders in a single year.<sup>20</sup> The NYPD Transit Bureau received 557 sex crime reports in 2019,<sup>21</sup> an infinitesimal number compared to the number of rides.<sup>22</sup> It is unclear how many of those reports were substantiated.

Speculation and disdain for a socially disfavored group should not be used to justify limitations on fundamental liberty.<sup>23,24</sup> The proposed legislation would expel riders with known histories of sexual misconduct, yet ninety-five percent of sex offenses in New York are committed by individuals who have no such histories.<sup>25</sup> Research also suggests that the threat of harsh punishment, in this case banishment, does not deter people from committing crimes.<sup>26</sup> The proposed Transit Ban is unlikely to prevent or deter most of the unlawful sexual conduct it seeks to forestall.

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<sup>20</sup> NYC Dept. of Transportation, “New York City Mobility Report.” p. 7 (Aug. 2019)(noting that there were “over 2.5 billion yearly riders” in 2017), available at <https://www1.nyc.gov/html/dot/downloads/pdf/mobility-report-singlepage-2019.pdf>.

<sup>21</sup> *Complaints for Offenses Described in Administrative Code 14-150(d) Occuring in Transit Jurisdiction, CY 2019*, Available at [https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis\\_and\\_planning/transit-bus-crime-reports/2019/complaints-in-transit-report-cy-2019.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/transit-bus-crime-reports/2019/complaints-in-transit-report-cy-2019.pdf) (last visited March 2, 2020).

<sup>22</sup> Available at <https://www1.nyc.gov/html/dot/downloads/pdf/mobility-report-singlepage-2019.pdf>.

<sup>23</sup> See Alexandra Stupple, “Disgust, Dehumanization, and the Courts’ Response to Sex Offender Legislation,” National Lawyers Guild Review, Vol 73, No. 3, pp. 130n-n148, 133 (Fall 2014)(“Disdain for sex offenders is exacerbated during a moral panic. Current sex offender laws are part of a trend of moral panics concerned with sex that have consumed the country off and on since the 1930s.”), available at <https://www.google.com/url?q=https://www.nlg.org/nlg-review/wp-content/uploads/sites/2/2016/11/NLGRev-71-3-final.pdf&sa=D&ust=1582750993456000&usq=AFQjCNH9f0aP5p4rXSbpYLVJ9onZ4CmsQQ>.

<sup>24</sup> See *People v. McFarland*, 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010) (“Risk is not a moral judgment. It is (or should be) an empirical one. It is a determination which seeks to predict how likely it is that a specific future event – a sex offense – will occur.”)

<sup>25</sup> Sandler, J. C., Freeman, N. J., & Socia, K. M. (2008). Does a watched pot boil? A time-series analysis of New York State’s sex offender registration and notification law. *Psychology, Public Policy, and Law*, 14(4), 284–302. doi:10.1037/a0013881

<sup>26</sup> See Anthony N. Doob and Cheryl Marie Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, in Michael Tonry, ed., *Crime and Justice: A Review of Research*, vol. 30, 187 (2003) (reviewing more than thirty years of deterrence studies and concluding, “[w]e could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence.”).

The proposal does not explain how authorities will prevent banned individuals from accessing the transit system during a period of expulsion. Every day, more than 5.5 million people ride the city's subways; public buses transport more than 2 million riders.<sup>27</sup> With such a large number of people traveling through the city's vast network, the ability of authorities to spot and remove a banned individual will require a costly, difficult-to-implement mass surveillance program.<sup>28</sup> Inherent enforcement challenges, coupled with the low likelihood that even a person who has engaged in unwanted sexual contact in the past will do so again, renders the ban ineffective at achieving its stated public safety goals.

Banning an individual from the transit system may actually increase their likelihood of committing crime. People convicted of sex offenses already are a stigmatized group facing daily obstacles to employment, residency, and reintegration. Under the proposed legislation, individuals may lose the ability to commute to work; transport their children to school; attend medical appointments; or even get to court, supervision authorities, and mandated programs. During emergencies, such as dangerous weather events, expulsion from public transit may render shelter and emergency services inaccessible. People from low- and moderate-income households who cannot afford other means of transportation will suffer most. Even if banned people are ultimately not convicted of the accusations against them, they may suffer grave financial, employment, legal, and personal harm. Without access to public transit, many banned New Yorkers will struggle to maintain the key factors that help prevent recidivism: steady employment, education, physical and mental health treatment, other rehabilitative services, and enduring social ties.<sup>29</sup> The ban will hurt public safety, not enhance it.

Both state and federal courts have struck down harmful *de facto* banishment provisions written into sex offender laws. The Sixth Circuit Court of Appeals determined that Michigan's SORA restrictions, akin to "the ancient punishment of banishment," violated the constitution.<sup>30</sup> The law's burdensome geographic prohibitions, especially in densely populated cities, "consign[ed] them to . . . existence on the margins," preventing them from accessing jobs and attending to their children's activities.<sup>31</sup> The California Supreme Court similarly struck down widespread enforcement of "Jessica's Law," noting that its geographic restrictions "increased the incidence of homelessness among [people convicted of sex offenses], and hindered their access to medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative social services available to all parolees."<sup>32</sup> New York's proposed Transit Ban levies

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<sup>27</sup> MTA, Subway and Bus Ridership at a Glance, available at <http://web.mta.info/nyct/facts/ridership/>.

<sup>28</sup> Tom Wroblewski, Subway ban for perverts simply not feasible, Staten Island Advance, Jan. 11, 2020, available at <https://www.silive.com/news/2020/01/subway-ban-for-perverts-simply-not-feasible-opinion.html>

<sup>29</sup> United Nations Office on Drugs and Crime, *Introductory Handbook on The Prevention of Recidivism and the Social Integration of Offenders*, pp. 49 - 46 (Dec. 2018), available at [https://www.unodc.org/documents/justice-and-prison-reform/18-02303\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/18-02303_ebook.pdf); Public Service Scholars, "Recidivism and Barriers to Successful Reentry," (Aug. 2016), available at [https://publicservicescholars.umbc.edu/files/2016/11/Recidivism-and-Barriers-to-Successful-Reentry\\_Final.pdf](https://publicservicescholars.umbc.edu/files/2016/11/Recidivism-and-Barriers-to-Successful-Reentry_Final.pdf).

<sup>30</sup> *Does 1-5 v. Snyder*, 834 F.3d 696, 701 (6th Cir. 2016).

<sup>31</sup> *Does 1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016).

<sup>32</sup> *In re Taylor*, 343 P.3d 867, 1023 (Cal. Sup. 2015).

similarly harmful, and likely illegal, burdens on socially disfavored residents without enhancing public safety.

## **V. CONCLUSION**

In sum, the proposed Transit Ban presents significant constitutional and practical concerns, imposes undue restrictions on a large swath of New Yorkers, and does not further the stated goal of public safety. New York would be far better off focusing resources on rehabilitation services and promoting factors that reduce the risk of recidivism, which include the economic stability secured by mobility on the City's extensive transportation infrastructure. The transit ban appears to be a punitive attack on a reviled subclass that has no organized voice. This extreme measure will be impossible to enforce and only serve to further marginalize people trying to reintegrate into society. The City Bar strongly opposes the proposed legislation.

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