

THE RUTHERFORD INSTITUTE

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April 21, 2022

Hon. Bill Lee, Governor
State Capitol, 1st Floor
600 Dr. Martin L. King, Jr. Blvd.
Nashville, TN 37243

Re: HB 978 / SB 1610

Dear Governor Lee:

As an organization that strives to help communities balance the need to safeguard civil liberties while addressing safety, The Rutherford Institute¹ has grave concerns about the potential for overreach and abuse inherent in HB 978, which seeks to deter homelessness but has been drafted in such a way that it may not pass constitutional muster in court.

For example, in attempting to criminalize certain activities engaged in by the homeless such as camping in public, HB 978, as drafted by the Tennessee General Assembly, also broadly threatens to criminalize such commonplace activities engaged in by the general populace as sleeping, cooking, and laying down a blanket in public during certain times, subjecting so-called “violators” to a felony conviction carrying as much as 6 years imprisonment and a \$3,000 fine.²

Moreover, by criminalizing common activity which is wholly innocent such as resting or cooking in a public place during certain hours, this law not only gives police a basis for conducting arbitrary and pretextual seizures and searches of the homeless and their belongings but could also broadly be applied to law-abiding citizens and their belongings.

While we recognize the difficulties that public officials face in addressing the problems arising from homelessness, as the following analysis shows, the attempt by the Tennessee General Assembly to discourage homelessness by criminalizing activities enjoyed by the public at large is neither a sound answer nor a moral, compassionate response to the plight of the “least among us,” while also threatening the freedoms of the general populace.

¹ The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals’ constitutional rights and educate the public about threats to their freedoms.

² Tenn. Code Ann. §§ 39-14-414(f), 40-35-111(b)(5); HB 978 Sections 2-5.

HB 978 as broadly applied could render anyone “camping” in public a criminal.

Despite its intent, it is not only the homeless who could be adversely affected by HB 978.

HB 978 makes it illegal to “camp” under a bridge, overpass or on public property, the latter being punishable by 1 to 6 years imprisonment and up to a \$3,000 fine. However, by its plain terms, the law could also be broadly applied to any person whom police believe might be engaged in “camping” activities on public property. “Camping” is given a very broad definition by HB 978 and the Equal Access to Public Property Act of 2012 to include activities such as sleeping, cooking, and laying down a blanket.³

By criminalizing common activity which is wholly innocent, this law could give police a basis for conducting arbitrary and pretextual seizures and searches of citizens and their belongings⁴ simply because a person lays down a blanket for a picnic or rests and appears to be sleeping in a public place during certain hours. It thus threatens not only the homeless, but also other law-abiding citizens.

By attempting to criminalize homelessness, HB 978 only worsens the plight of the homeless.

The homeless, by far the most vulnerable in any community, have found themselves increasingly displaced and disadvantaged by laws and ordinances—part of a nationwide trend in urban and suburban communities—which criminalize homelessness and even inhibit individuals and organizations which aim to ease the suffering of the homeless.⁵

Rather than seeking constructive methods of addressing the problem of those who have nowhere to live and are unable to afford lodging, HB 978 will only worsen the plight of the homeless. While one provision of HB 978 would make it a Class C misdemeanor to “camp” under a bridge or overpass for shelter, penalizing the homeless with a \$50.00 fine and 20 to 40 hours of community service or litter removal only adds to their debt and hardship, and essentially enslaves the homeless to do forced labor without pay simply for having no other shelter. Other provisions of HB 978 significantly expand the Equal Access to Public Property Act of 2012 in Tenn. Code § 39-14-414, which will make unauthorized “camping” on any public property a Class E felony,⁶ punishable by 1 to 6 years imprisonment and up to a \$3,000 fine.⁷

³ Tenn. Code Ann. § 39-14-414(b); HB 978 Section 1(c).

⁴ See *Davis v. U.S.*, 564 U.S. 229, 232 (2011).

⁵ For example, the City of Fort Lauderdale, Fla., had passed an ordinance to shut down the practice of sharing food with the homeless in a downtown park. *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266 (11th Cir. 2021).

⁶ Tenn. Code Ann. § 39-14-414(f).

⁷ Tenn. Code Ann. § 40-35-111(b)(5).

An arrest for violating HB 978 will also likely lead to an inventory search of all the property seized pursuant to Tenn. Code § 39-14-414(d)(4) and (e). For those who are homeless, it is cruel to take what little property they have, and then require them to produce identification, provide their contact information, and possibly pay a storage fee as required by Tenn. Code § 39-14-414(e) in order to obtain their property back.

Court rulings on laws similar to HB 978 suggest it would not withstand constitutional scrutiny.

Court rulings on similar laws indicate Tenn. Code § 39-14-414 and the law proposed by HB 978 are likely unconstitutional in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

Since the Fiscal Memorandum to HB 978, dated March 25, 2022, states that "there have been zero convictions under Tenn. Code Ann. § 39-14-414 over the past five years," it seems that there might not yet have been a need or opportunity to challenge the constitutionality of the current Tennessee law, but the expansion of its enforcement by HB 978 could likely change that.

A federal appellate court held that a similar ordinance against camping in Boise, Idaho was unconstitutional and violated the Eighth Amendment as applied to homeless persons "camping" in public who had no other shelter available to them.⁸ Similar to HB 978, Boise's ordinance made it a misdemeanor to camp in any public place, and defined "camping" broadly to include sleeping, laying down of bedding to sleep, cooking, and storing belongings.⁹ And just as HB 978 does not require alternative shelter to be available, neither did Boise's ordinance.¹⁰ For these reasons, the federal appellate court held that "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."¹¹ The Eighth Amendment thus forbids laws, like HB 978, which criminalize being homeless in public places.¹²

Additionally, other court decisions have found similar laws to be unconstitutional for being overbroad and vague attempts to punish wholly innocent conduct. For example, an Alabama appellate court struck down an ordinance forbidding sleeping in a car on a public street because it encouraged arbitrary and discriminatory arrests by police who had unfettered discretion to determine whether the conduct of the person cited was lawful or unlawful. The court ruled that the ordinance "makes no distinction between conduct that is calculated to harm and that that is essentially innocent. It provides punishment for unoffending behavior and makes criminal activities that are normally considered innocent. In this sense, it is similar to vagrancy ordinances, which have been held to be unconstitutional."¹³

⁸ *Martin v. City of Boise*, 920 F.3d 584, 603-04 (9th Cir. 2019).

⁹ *Id.* at 618; and see Tenn. Code Ann. § 39-14-414(b) and HB 978 Section 1(c).

¹⁰ *Martin*, 920 F.3d at 618.

¹¹ *Id.* at 617.

¹² *Id.* at 617-18.

¹³ *Horn v. City of Montgomery*, 619 So.2d 949, 951 (Ala. Crim. App. 1993).

HB 978 similarly leaves it up to a police officer's discretion to determine whether innocent conduct is considered "camping" and can thus lead to arbitrary and discriminatory enforcement of the law.

Likewise, a Florida appellate court found an ordinance which made it unlawful for a person to "lodge or sleep in, on, or about any automobile . . . in any public street . . . or other public property" to be unconstitutionally overbroad by criminalizing conduct which does not impinge upon the rights of others.¹⁴ The court noted that a "penal statute that brings within its sweep conduct that cannot conceivably be criminal in purpose or effect cannot stand."¹⁵ The court also found the ordinance to be void for vagueness because it covered a variety of wholly innocent activity, yet left to the police officer's unbridled discretion whether the ordinance should be enforced.¹⁶

Finally, HB 978 contradicts the moral imperative to care for the "least" among us.

HB 978 is a counterproductive, cosmetic attempt to address homelessness by shuffling the homeless around or having them arrested and removed from the community's sight.

While it will add to the burden of law enforcement, who doubtless have more pressing safety concerns to address, it will not, however, address the underlying problems associated with homelessness, nor will it provide more affordable housing, shelters, mental health services, or programs that target the source of the problem.

Under HB 978, even Jesus Christ and His disciples would likely be arrested and convicted for daring to camp, sleep and eat in public. As the New Testament attests, Jesus said, "Foxes have holes, and birds of the air have nests, but the Son of Man has nowhere to lay his head,"¹⁷ and Paul wrote, "To the present hour we hunger and thirst, we are poorly dressed and buffeted and homeless."¹⁸

Indeed, there is a moral imperative among world religions but *especially* within the Judeo-Christian tenet to care for the least of those among us, such as the homeless and poor.

As Jesus said, those who inherit the kingdom will do so because "I was naked and you clothed me, I was sick and you visited me, I was in prison and you came to me," for "as you did it to one of the least of these my brothers, you did it to me."¹⁹

¹⁴ *City of Pompano Beach v. Capalbo*, 455 So.2d 468, 470 (Fla. App. 1984).

¹⁵ *Id.* at 471.

¹⁶ *Id.* at 470.

¹⁷ *Matthew* 8:20; *Luke* 9:58 (English Standard Version ("ESV")).

¹⁸ *1 Corinthians* 4:11 (ESV).

¹⁹ *Matthew* 25:31-46 (ESV).

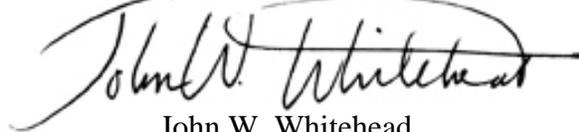
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HB 978 must be revisited and its shortcomings addressed

In conclusion, the distress felt by members of the public when forced to confront the problem of homelessness in our communities should never be a basis for measures worsening the plight of the homeless, which is precisely what HB 978 does.

In light of the harm that HB 978 will cause to the homeless and the public at large, and its dubious constitutionality, The Rutherford Institute urges you and the General Assembly to revisit this misguided legislation with an eye towards addressing its troubling shortcomings.

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John W. Whitehead
President