Date: May 11, 2021

To: Committee on Criminal Justice and Public Safety

Re: Testimony in Opposition to LD 1478: Exempting Persons Claiming to be "Homeless" from Criminal Laws

To the Chair of the Committee and Committee Members:

LD 1478 proposes that anyone who "lacks a home" (undefined) shall be immune from any criminal penalties for the following behaviors:

criminal trespass that is based on loitering or associated conduct;
disorderly conduct that is based on loud or unreasonable noise;
disorderly conduct involving activating a device or releasing a noxious or offensive odor;
fighting;
indecent conduct based on urinating in public;
public use of scheduled drugs;
public drinking and associated behavior.

Any law enforcement officer who encounters a person committing any of the listed offenses must "inquire whether the person has a home or lacks a home." If the person states that he lacks a home, he "is not subject to arrest or prosecution for the offense."

This bill, although undoubtedly well-intentioned, is both a legal and practical disaster:

It unconstitutionally carves out a favored class of persons as exempt from what are, for everyone else, criminal laws of general application;

It is based on unfounded, stigmatizing, and paternalistic assumptions about the behavior in which "homeless" people as a class engage, and implicitly assumes that they are unable to comply with ordinary criminal and civil norms;

It strips the community of any ability to control any of the criminal behavior above, if the person has self-described "homeless" status, regardless of the need for police, neighbors, or other homeless people (who are often the victims of the behavior) to stop the conduct; and

It will engender unprecedented public resentment, fear, and anger against all homeless people, who (under LD 1478) are accurately perceived to be able to engage in all

of the behaviors above with impunity.

I. LD 1478 is an apparent attempt to set up a diversion program of sorts for "homeless" individuals, from the application of certain general criminal laws. However, this is not the way to do it. Carving *exemptions from general criminal laws on the basis of selected identity or personal characteristics* denies equal protection of the laws and is blatantly unconstitutional.

The essence of general criminal laws is that all individuals are responsible for the same behavior, and on the same legal grounds, as all other individuals. Giving a certain defined or favored class of persons (on the basis of selected personal identity or characteristics) an express, textual exemption from the general criminal laws to which all other citizens are subject is not only a breeding ground for intense popular backlash (although it is that as well) – it is a violation of basic federal constitutional principles.

Of all laws, criminal laws – with their deprivations of liberty – are governed most strictly by the federal constitutional order. Favoritism carved into criminal laws for particular individuals or groups is presumptively unconstitutional, under the federal Constitution's Equal Protection Clause. *A general criminal law, by its own terms, must apply to all citizens equally.* Differences in decisions about individual prosecution or punishment are handled, and must be handled, by post-application discretion exercised by police, prosecutors, and judges. As a matter of stated, textual law, all citizens must be subject to the same general criminal laws and the same possible penalties.

The reason for this is obvious. The state cannot designate certain economic groups, or social groups, or ethnic groups, or propertied or unpropertied groups, as absolutely exempt from the application of criminal laws that are applicable to all other citizens. Exemption from criminal laws prohibiting trespassing, assault, indecent exposure, disorderly conduct, public drug use, public drinking, and the others listed in LD 1478 cannot be decreed, as a matter of legislative fiat, for any favored class. The proponents of LD 1478 do not argue that the persons in the exempt class have not engaged in the prohibited conduct; rather, what they assert is that no criminal liability, under any circumstances, should follow. When the fundamental liberty of persons is at stake, any classification that makes some citizens criminally liable and exempts others must pass the most strict judicial scrutiny. There is, in truth, no reason – let along a compelling reason – why a person claiming"homeless" status should be exempt from assault charges, or scheduled drug use, or disorderly conduct, or breaching the peace, or criminal trespass, while others without that status are not.

Treating citizens differently by carving special, textual exemptions into general criminal statutes on the basis of the identity of particular groups or classes of persons begs constitutional challenge. Because this is a textual, legislative exemption from general criminal statutes on the basis of favored class or personal status, there is no question but that a constitutional challenge against what this bill proposes would succeed.

What can be done – and is now done under existing law – is the use of discretion in all cases by all actors in the criminal justice system: discretion in the decisions by police to simply counsel or arrest, in the bringing of formal charges by prosecutors, in choices in sentencing, in the availability of deferred dispositions, and in all of the other routine ways that the criminal justice system responds to the particular facts of individual cases. All of those paths are now available and remain available in cases involving the homeless, and any genuinely extenuating circumstances that might exist in a particular case can be recognized. (As described below, extenuating circumstances might well exist in some cases involving individuals who claim homeless status, but not in others.) If LD 1478 simply encouraged these kinds of solutions in deserving cases, it would be eminently acceptable. In its present form, of carving blanket exceptions from general criminal statutes, it is not.

II. The assumptions behind LD 1479 are stigmatizing, paternalistic, and ignore the fact that the vast majority of homeless people conform with criminal laws and neighborhood norms, and in fact desire enforcement of criminal laws against those who – in their midst – do not.

Having lived across the street from the Portland's Oxford Street ("low barrier") Homeless Shelter for twelve years, the first thing that one learns is that "the homeless" are not a monolithic group. There are many excellent people who have stayed in the shelter over the years, who are having financial or other personal problems and are deserving of every way that the community at large can help them. If what they are doing inadvertently creates a conflict with others, with neighbors or other homeless persons, they will overwhelmingly and simply apologize and accommodate when asked. These people do not need (or want) the immunities of LD 1478 and the implied stigmatization of the homeless that comes with it: that the homeless – as a group – "typically engage" in the behavior listed in LD 1478, and therefore (paternalistically) need to be excused in advance for it.

There are others – sometimes shelter residents, but more often those who simply hang out in tents, on sidewalks, or in cars around the shelter's periphery – who create problems for everyone: neighbors, police, other shelter residents, and shelter staff. More often than not, they prey on other shelter residents; they are alienated, aggressive, and repeatedly clash with staff and police. They feel that they are entitled to ignore complaining neighbors, shelter rules, or others in the community, and they resist requests to cease what they are doing with strings of expletives and threats of violence. They routinely engage in the behaviors that LD 1478 aims to immunize: urinating on driveways, strewing trash, used condoms, and drug paraphernalia on yards and streets (despite the presence of city-provided public toilets and trash cans less than 20 feet away), threatening shelter staff, smoking weed, spice, and tobacco on sidewalks and curbs a few feet from occupied homes, yelling and blaring music in the middle of the night, angrily challenging those who complain or call the police. These are the people for whom enforcement powers of the police are called, and the ones for whom the threat of criminal arrest exists. It is also this group whose immunity from police enforcement LD 1478 would (effectively) establish.

III. LD 1478 is completely unworkable, requiring police to accept "self declarations" of homeless status and subsequent immunity from the enforcement powers that are necessary to protect others. It will also – as a result – to lead to unprecedented public anger, resentment, fear, and stigmatization of homeless people as a class.

There are reasons why the offenses listed in LD 1478 – dealing with public drug use, disorderly and indecent conduct, public drug use, noise, loitering, releasing noxious or offensive odors, fighting, and so on – exist in the criminal law. They are there because all of those in the broader community deem them to be necessary for the maintenance of civility and safety in our communities, and a part of our quality of life.

The first glaring problem with LD 1478 is the "mechanism" that it establishes. Any law enforcement officer who encounters a person committing any of the listed offenses must "inquire whether the person has a home or lacks a home." If the person states that he lacks a home, he – then and there – "is not subject to arrest or prosecution for the offense."

Under this proposed legislation, how are the police supposed to know if a person who is confronted, and claims that he is "homeless," really is? News that no arrest or sanction can follow if homelessness is claimed, is news that will be quickly known among those who routinely break criminal laws like these. People in this situation are not stupid; in fact, they are very savvy about what they can get away with, and what they cannot.

In addition, the inquiry – "are you homeless?" – has no meaning, anyway. What is a "homeless" person? No definition appears in LD 1478. Is a person who lives in a shelter, such as the Oxford Street Shelter, homeless? (Some people live there for years; at a recent Portland City Council meeting, a woman testified that she has lived there for 16 years.) Is a person who lives in an overcrowded SRO unit or apartment "homeless"? Does one have to be paying rent to be "homed," or is shelter at the sufferance enough? What about a person who is "crashing" in the apartment of friends? What is he claims to be living in his (old, new, dilapidated, well-appointed) car? And how is a police officer supposed to undertake this investigation, while confronting an offender on the street?

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The removal of the ability of police to enforce these laws – when it involves acts done by those who claim "homeless" status – will create an unprecedented sense of anger and victimization among those whose quality of everyday life is impacted by this move. The idea that upon tense and angry confrontation, after repeated "in your face" and "f— you" behavior, the only thing that a victim can do is to call the police – who, in turn, can only "provide [the actor with] appropriate information and referrals to resources in the community" – is, quite frankly, beyond stunning. What if the "resources" are suggested to an individual two times, three times, four times ... and the behavior continues – because the individual knows that he is immune from any other consequence, and (frankly) he couldn't care less about resources or changing his life? LD 1478 reflects a stunning naivete about the segment of the population that is in fact the subject of police confrontations in urban neighborhoods today. The police are often a very thin line between coexistence and chaos in these neighborhoods. If all enforcement power is taken

from police, the people who now rely on the police for their only recourse against repeated bad actors will be overwhelmed with feelings of helplessness, victimization, and rage.

As a final comment, anyone who has tried to deal with siting homeless shelters knows that it is already extraordinarily difficult to get any neighborhood to accept the idea of a homeless shelter in its midst. If this Bill passes, it will be absolutely impossible. As soon as the people who live in the proposed area know that self-declared "homeless" people will exempt from laws against loitering, disorderly conduct, indecency, noise, fighting, littering, public drinking and drug use, and all of the rest, *no one* (for good reason) will welcome a shelter into their neighborhood.

I appreciate the opportunity to submit my comments to you.

Sincerely,

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