M E M O R A N D U M

TO: Rep. Helen Head & Members of the House General, Housing & Military Affairs Committee

DATE: February 22, 2018

FROM: Chloé White, American Civil Liberties Union
Jessica Radbord, Vermont Legal Aid
Erhard Mahnke, Vermont Affordable Housing Coalition

RE: H.412, Homeless Bill of Rights

Thank you for your interest in protecting the rights and dignity of Vermonters experiencing homelessness and for the opportunity to provide further information regarding H.412. We would like to address several issues with regard to the most recent version of the bill (Draft 1, 2-16-2018), as well as concerns raised by South Burlington Police Chief Trevor Whipple and other witnesses.

Committee members know all too well that homelessness is a grave problem in Vermont. 1,225 Vermonters were found to be without a permanent home in the 2017 Point-In-Time Count. 10,083 applications for emergency housing were granted by the Department for Children and Families in the winter of 2017. There is not enough safe and affordable housing in Vermont. Funding for services to prevent and end homelessness is insufficient to meet the level of need in our communities. Some individuals who are unsheltered also have serious disabilities, making it even harder for them to access housing and supportive services. Localities often have inadequate shelter, or no daytime shelter, so people experiencing homelessness inhabit public spaces by day, by night, or both. The men, women, and children of Vermont who are experiencing homeless have basic needs like the rest of our citizens, including food, restroom facilities, a space to keep their personal belongings, and a place to sleep or rest. Unfortunately, in recent years there has been a disturbing trend in some Vermont communities to attempt to criminalize or otherwise sanction certain life-sustaining activities and block efforts to site emergency shelters.

Business owners and residents may feel that street homelessness infringes on the safety and attractiveness of our communities, and consider using ordinances to minimize the conspicuousness of people experiencing homelessness. But local measures that criminalize or regulate the right of people experiencing homelessness to use public spaces, to access public services, to engage in protected speech, and, most importantly, to simply *be* – sitting, sleeping, standing in a non-obstructive way in a public space – like any other Vermonter has the right to do, are unlawful and contrary to our Vermont values. Our goal with this bill is to protect the basic rights of people experiencing homelessness, not to confer special rights. But because people experiencing homelessness are so vulnerable and so disfavored, the protections afforded by the bill as introduced and amended to include selected provisions from the January 30 draft are desperately needed.

Regarding the newest draft, we were distressed to see that the new version removes all of section 2 of the original bill, the 'Homeless Bill of Rights.' The protections contained within this section are essential to this legislation – without them, the bill loses much of its efficacy. We ask, at a minimum, that the committee restore this section to preserve the original intent of the bill.

Second, regarding Chief Whipple's comments, as well as those of others who have testified, again, the intention of this legislation is not to give someone who is homeless 'special rights,' or allow someone who is homeless the ability to act with impunity in private businesses. As noted by Human Rights Commission Director Karen Richards in her February 20 letter, there is nothing in the bill that would trump existing criminal laws or the right of private property owners to decline to allow people experiencing homelessness from using their property.

There is a very distinct line between identity and action. While a business owner could not eject someone from their business simply due to their status as a homeless person, just as that owner could not eject a woman or a Hispanic person or someone with a disability simply due to their identities, a business owner could of course eject someone who was causing a disturbance or breaking the law. We are concerned about shielding those who are homeless from discrimination based on their status as someone experiencing homelessness, not those who break laws or create disturbances and are homeless. As suggested by Ms. Richards, to allay the concerns of Chief Whipple and others, the Committee could consider language expressly stating that nothing in the law is intended to affect the enforcement of existing criminal laws.

Chief Whipple and others have also expressed concern that under this bill, municipalities would not be able to enact bills prohibiting certain behaviors, like aggressive panhandling, soliciting or offering food or water, sleeping in parks, or disrupting traffic. First, those sorts of actions are covered by pre-existing criminal prohibitions, such as laws on harassment or public or traffic safety.

Second, after the U.S. Supreme Court decision in *Reed v. Town of Gilbert*,[1] many such ordinances have in fact been found unconstitutional under the First Amendment. In *Reed*, the Supreme Court decreed that government may regulate the content of speech only under the narrowest of circumstances. It may not pass a law that applies to particular speech because of the topic discussed or the idea or message expressed. Government regulations curtailing free speech must be written as narrowly as possible and fulfill a "compelling government interest" (the strict scrutiny test). This does not prohibit government regulation of all speech. For instance, in *Recycle for Change v. City of Oakland*, 856 F.3d 666 (9th Cir. 2017), the Court of Appeals found a law regulating unattended collection boxes constitutional as content neutral, and serving the important government purposes of preventing blight and interference with traffic.

Citing *Reed*, many courts have struck down ordinances forbidding panhandling, finding that they impermissibly discriminate on the basis of speech content.[2] Further, in *Cutting v. City of Portland*, 2014 WL 580155, *aff'd* 802 F.3d 79 (1st Cir. 2015), the court held that an ordinance

[1] 135 S. Ct. 2218 (2015).

[2] http://www.governing.com/topics/health-human-services/gov-panhandling-homeless-supreme-court-reed-gilbert.html]]

barring people from sitting or standing on any traffic median was an unconstitutional, content-based restriction on expressive activity and was not tailored narrowly enough to serve the city's interest in protecting public safety. It is notable in this context that Burlington's City Attorney recently issued a memo in which she cites several city ordinances related to panhandling and solicitation for charitable contributions, among others, that she believes are unconstitutional. H.412 as introduced would not change federal legal landscape for these issues.

There is also case law that supports creation of a state statute barring the adoption of overly broad and unconstitutional ordinances regulating the life-sustaining activities of people experiencing homelessness. For instance, in *Metropolitan Council Inc. v. Safir*, 99 F.Supp.2d 438 (S.D.N.Y. 2000), a District Court held that a statute banning public sleeping in any manner on public sidewalks was overbroad, but noted that it was not the case that the city could never regulate "disorderly public sleeping." In another case in the Second Circuit, *Streetwatch v. National R.R. Passenger Corp.*, 875 F.Supp. 1055 (S.D.N.Y. 1995), the court issued an injunction barring the police from selectively arresting or ejecting persons they believed to be homeless from the publicly open Amtrak station even though they had no evidence that the people were committing any crimes. Lastly, the Supreme Court held that a Vermont law designed to protect doctors from "harassing sales behaviors" was an unconstitutionally overbroad regulation of speech in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), indicating that it is a "necessary cost of freedom" to at times "endure speech [we] do not like." *Id.* at 575.

Moreover, this bill would help municipalities by establishing clarity in the form of a state statute that bars unconstitutional prohibitions on the activities of people experiencing homelessness, reducing the likelihood of expensive and time-consuming litigation like the cases described herein.

Reintroduction of section 2 also protects Vermont's interest in obtaining funding from the federal Department of Housing and Urban Development (HUD) to combat homelessness. In applying for Continuum of Care funding from HUD, the collaborative applicant agencies must indicate what steps the local Continua have taken to combat the criminalization of homelessness. Our applications for HUD funding would be strengthened by inclusion of these important civil rights protections in this bill that act to combat the criminalization of homelessness.

Based on all of the above, we ask that the committee restore not just the original section 2 from the bill as introduced, but also paragraphs (c), (d), and (e) of section 2 in the 1-30-18 draft. We would also ask the Committee to restore section 22 of the 1-30-18 draft, which adds housing status to the hate-motivated crimes statute at 13 V.S.A. § 1455.

Lastly, though we agree with Ms. Richards' testimony in Committee that the objections raised against including housing status in section 4, paragraph (6) on lending are not justified, we agree that it can be removed.

Thank you for your consideration and for your work on behalf of Vermonters experiencing homelessness.