

# Criminalizing Homelessness Through Abusive Preemption

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On any given night, nearly 600,000 people in the United States experience homelessness.<sup>1</sup> Over a quarter of those are families with children.<sup>2</sup> BIPOC communities are disproportionately represented: Pacific Islanders experience homelessness at nearly ten times the rate of white people; African-Americans experience homelessness at nearly five times the rate of white people, and Latinx individuals experience homelessness at nearly double the rate of white people.<sup>3</sup>

Despite the need, there are fewer than 400,000 beds available for people to seek shelter.<sup>4</sup> That means that even if every single shelter bed in the United States were used, over 30% of people experiencing homelessness would have nowhere to sleep but on the streets.

As the homelessness crisis continues to grow with the rising cost of living and little social safety net, local governments are on the front lines of responding. The “housing first” approach, emphasizing permanent supportive housing with voluntary support services,

has shown promising success in several studies.<sup>5</sup> Indeed, recent studies suggest that lack of affordable housing supply is one of the most significant factors aggravating homelessness.<sup>6</sup> Struggling with lack of space and housing supply, some cities have piloted different short-term approaches to provide shelter and interim housing, such as renting or buying space in hotels and motels to house people<sup>7</sup>; creating tiny home villages<sup>8</sup>; or providing public space where individuals experiencing homelessness can camp, usually with access to sanitation and facilities. For example, San Francisco, Sacramento, and Seattle all have designated spaces where individuals experiencing homelessness camp with access to meals, toilets and showers, and coordination to find more permanent housing solutions.<sup>9</sup> Such designated camping areas have been met with mixed reviews, with concerns raised about the restrictions placed on individuals in these camps, presence of law enforcement, and lack of emphasis on continuing to expand permanent supportive housing supply.<sup>10</sup>

1. Nat'l Alliance to End Homelessness, State of Homelessness: 2021 Edition, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/> (last visited Apr. 18, 2022).

2. *Id.*

3. *Id.*

4. *Id.*

5. Nat'l Alliance to End Homelessness, Permanent Supportive Housing (Mar. 2021), <https://endhomelessness.org/ending-homelessness/solutions/permanent-supportive-housing/>.

6. See Gary Warth, Cause of Homelessness? It's Not Drugs or Mental Illness, Researchers Say, L.A. Times (July 11, 2022), <https://www.latimes.com/california/story/2022-07-11/new-book-links-homelessness-city-prosperity>; Andrew Khouri, High Cost of Living Drives Up Homeless Rates, UCLA Study Indicates, L.A. Times (June 13, 2018), <https://www.latimes.com/business/la-fi-ucla-anderson-forecast-20180613-story.html>.

7. See, e.g., Conor Dougherty, One Way to Get People Off the Streets: Buy Hotels, N.Y. Times (Apr. 17, 2021), <https://www.nytimes.com/2021/04/17/business/california-homeless-hotels.html>.

8. See, e.g., Associated Press, L.A. Takes on Homelessness with Its First Tiny House Village, KTLA (Mar 10, 2021), <https://ktla.com/news/local-news/l-a-opens-its-first-tiny-home-village-to-house-homeless-individuals/>; Giles Bruce, Tiny Homes, Big Dreams: How Some Activists Are Reimagining Shelter for the Homeless, NPR (Feb. 6, 2022), <https://www.npr.org/sections/health-shots/2022/02/06/1077791467/tiny-homes-big-dreams-how-some-activists-are-reimagining-shelter-for-the-homeless>.

9. See Benjamin Oreskes, Could a San Francisco Experiment Be an Answer to L.A.'s Sprawling Street Encampments?, L.A. Times (May 7, 2021), <https://www.latimes.com/homeless-housing/story/2021-05-07/san-francisco-tests-campsites-homelessness-solution>.

10. See, e.g., Nat'l Coalition for the Homeless, Position Statement on Sanctioned Encampments (Sept. 14, 2021), <https://nationalhomeless.org/sanctioned-encampment-policy/>.

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However, one approach that has been both widely denounced as counter-productive and repeatedly held to be unconstitutional is the criminalization of homelessness. Criminalization of homelessness can take many forms—from banning public camping or sitting, sleeping, or storing personal property in public to prohibiting sleeping in cars—and leads to individuals experiencing homelessness facing arrest at 11 times the rate of people who are housed.<sup>11</sup> Convictions from these arrests leaves individuals with a criminal record that makes it even more difficult to find housing; indeed, 79% of formerly incarcerated individuals were denied housing during their re-entry.<sup>12</sup> Not only does criminalization perpetuate cycles of poverty and homelessness, it is the most expensive policy choice and cities could save millions by emphasizing housing over handcuffs.<sup>13</sup> Finally, several courts have found that bans on public camping without any meaningful offer of shelter<sup>14</sup> simply criminalize the state of homelessness, thus violating the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>15</sup>

Despite this, some states have begun to use preemption to force localities to criminalize camping in public, taking local resources away from proven solutions that could address the root causes of homelessness. Rather than solve the crisis, this preemption exacerbates it by punishing people who can find shelter nowhere else.

Further, this preemption forces cities to spend hundreds of thousands of dollars on incarcerating vulnerable populations rather than using that money to provide services or increase the supply of shelter or housing. As with so many forms of abusive preemption, this state intervention actually hinders the ability of local governments to tailor local solutions for local needs and harms the most vulnerable in our communities.

This abuse of preemption has been fueled by a national conservative think-tank, the Cicero Institute, which has placed ten preemption bills in seven states (Arizona, Georgia, Missouri, Oklahoma, Texas, Tennessee, and Wisconsin) over the past two legislative sessions.<sup>16</sup> Texas became the first state to pass such a law in 2021, and Tennessee and Missouri have followed in 2022. Although this trend is nascent, the Local Solutions Support Center (LSSC) created this resource to call attention to this alarming new preemption trend and begin the conversation with cities about fighting back.

## Part I On the Rise: Preempting Camping to Push Criminalization

Using state preemption to criminalize homelessness is a relatively new trend that appears to be almost entirely driven by one Texas-based conservative think-tank, the Cicero Institute. Founded in 2016 by Joe Lonsdale, the billionaire co-founder of Palantir—a tech company with dubious involvement in government surveillance of immigrants, Muslim communities, and communities of color—and long-time admirer of the Koch Brothers, the Cicero Institute has developed model language for criminalizing homelessness that has appeared in nine different bills in six different states in the past two years.<sup>17</sup> At this point, three bills have already been enacted into law: in Texas, Missouri, and Tennessee. With a network of former Trump Administration operatives and registered lobbyists in at least nine states, the Cicero Institute is rapidly expanding its state advocacy.



11. Nat'l Homelessness Law Ctr., *Housing Not Handcuffs* 50 (2019), <https://homelessnesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.

12. Brentin Mock, *Should People With Criminal Histories Be Banned From Public Housing?*, CITYLAB (Sept. 18, 2015), <https://www.citylab.com/equity/2015/09/should-people-with-criminal-histories-be-banned-from-public-housing/406015/>

13. See Lavena Staten, *Penny Wise But Pound Foolish: How Permanent Supportive Housing Can Prevent a World of Hurt* 26-27, Homeless Rights Advocacy Project, Seattle School of Law (July 12, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3419187](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3419187).

14. It is still unclear what is considered a meaningful offer of shelter.

15. See, e.g., *Martin v. Boise*, 920 F.3d 584, 617 (9th Cir. 2019).

16. See Kristian Hernandez, *Homeless Camping Bans Are Spreading. This Group Shaped the Bills*, Pew (Apr. 8, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2022/04/08/homeless-camping-bans-are-spreading-this-group-shaped-the-bills>.

17. See Kristian Hernández, *Homeless Camping Bans Are Spreading. This Group Shaped the Bills.*, Pew (Apr. 8, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2022/04/08/homeless-camping-bans-are-spreading-this-group-shaped-the-bills>.

## **A. Cicero Institute’s Plan for Handcuffs Over Housing**

The Cicero Institute’s plan rests on a rejection of the research-supported local emphasis on permanent supportive housing. The Cicero Institute argues that this approach “ignor[es] the real prevalence of mental health and substance abuse among those on the streets,”<sup>18</sup> even though recent research has validated that housing unaffordability not mental health or substance abuse is at the root of the homelessness crisis.<sup>19</sup> The Cicero Institute has published a model state bill that would deprive cities and nonprofits of funds to support many interim shelter and housing initiatives while forcing cities to criminalize homelessness.<sup>20</sup>

During a nationwide shelter shortage, the model bill would criminalize camping outside of a state-designated camping site. The model bill would make sleeping or camping in public outside of a state-designated camping site a Class C misdemeanor, subject to a potential \$5000 fine, one month incarceration, or involuntary commitment to local drug or mental health courts. Such a conviction would come with a life-long criminal record.<sup>21</sup> There is no exception to criminalization if there is no shelter or state-designated camping space available to an individual experiencing homelessness because of cut funds and lack of supply. And if an individual is expelled from a state-designated campsite because of addiction or mental health, then they will be subject to these criminal penalties without a meaningful alternative.

The model bill uses preemption to coerce municipalities into enforcing this criminalization. Municipalities that refuse to enforce the criminalization could lose access to all state public safety funds, not simply those related to alleviating homelessness.<sup>22</sup> Localities would be required to dedicate significant law enforcement resources to criminalizing homelessness regardless of whether they think that is the best way to use their law enforcement resources and even if their police forces are ill-equipped to be first responders to people experiencing homelessness.

As the model bill diverts funds toward criminalizing homelessness, it also restricts availability of state funding to nonprofits and municipalities to increase the supply



of shelter and short-term housing. The model bill would allow only three types of short-term housing options to be funded: 1) “pay-for-performance” shelters where funding is conditioned on demonstrating employment outcomes for shelter residents, 2) time-limited individual shelter with a recommended eviction date of six-months, or 3) state-designated camping facilities subject to mental health and substance testing.<sup>23</sup> State funds would not be available for the construction of any short-term housing that cost more than \$55,000 per bed or the maintenance of short-term housing that costs more than \$20,000 per year.<sup>24</sup> Since the average building or maintenance cost of interim shelter options—such as building tiny home, buying up hotel and motel rooms, or maintaining a homeless shelter—exceeds these limits,<sup>25</sup> the model bill realistically cuts funding to municipalities and nonprofits providing alternative shelter options.

Essentially, in the midst of a shelter shortage, the model bill cuts off support for short term shelter options that aren’t either time-limited or highly restrictive on individuals experiencing homelessness and then penalizes individuals who cannot access these limited options. Municipalities face a Hobson’s choice: saddle some of society’s most vulnerable with a criminal record because of a shelter shortage they cannot control or lose significant funds to provide for the safety of the community.

18. Cicero Inst., Homelessness, <https://ciceroinstitute.org/issues/homelessness/> (last visited Apr. 25, 2022).

19. See Warth, *supra* note 6.

20. Cicero Inst., Reducing Street Homelessness Model Bill (Nov. 2, 2021), <https://ciceroinstitute.org/research/reducing-street-homelessness-model-bill/>.

21. *Id.* § 2(D).

22. *Id.* § 2(H).

23. *Id.* § 2(A).

24. *Id.* § 2(F).

25. See, e.g., Erin Baldassari & Molly Solomon, California Found Hotels for 10,000 Homeless Residents. What Next?, KQED (June 23, 2020), <https://www.kqed.org/news/11825653/california-found-hotels-for-10000-homeless-residents-what-next>; Brittany Chang, LA Has Unveiled the US’ Largest Prefab Tiny Home Village for the Homeless—See Inside the \$5.1 Million Community, Business Insider (Oct. 24, 2021), <https://www.businessinsider.com/photos-los-angeles-new-large-prefab-tiny-home-village-homeless-2021-10>.

## B. 2021 Legislative Session

During the 2021 legislative session, the Cicero Institute worked with four conservative state legislatures to propose versions of its model bill criminalizing homelessness. Only Texas, passed its bill into law. Below are summaries of the four bills:



### Arizona HB 2668

Borrowing from the Cicero Institute’s model bill, HB 2668 would have prohibited camping—defined as “temporary habitation outdoors” as evidenced by placing or storing personal belongings, laying down sheets or bedding, or erecting a tent—on public property as a Class C misdemeanor.<sup>26</sup> Individuals experiencing homelessness would be assigned camp in “structured camping facilities” designated by the state and could be removed if they do not “comply with any service obligations.” If an individual was removed from such a site and could not find alternative shelter, they would be subject to criminal penalties. This bill died in committee.



### Georgia HB 713

Georgia HB 713 introduced the Cicero Institute’s model almost exactly—criminalizing public camping outside of state-designated “structured camping facilities as a misdemeanor—except that it additionally would have required municipalities to spend 25% of federal Byrne-JAG grants on homeless outreach teams that integrated police officers to enforce the bill’s ban on public camping.<sup>27</sup> This bill also died in committee.



### Wisconsin AB 604

Wisconsin AB 604 integrated the criminalization of public camping as a Class C misdemeanor, except in state-designated “structured camping facilities” where individuals could be removed subject to failure of a substance abuse or mental health evaluation.<sup>35</sup> Additionally, AB 604 would have added “pay for performance” conditions to many state grants supporting shelter and services for individuals experiencing homelessness, so that recipients would have to demonstrate that individuals in their programs had positive employment or housing outcomes. This bill progressed through the Assembly, but died in the Senate.



### Texas HB 1925 (Bill Passed)

Texas HB 1925 prohibits a person from “[1] intentionally or knowingly [2] camp[ing] in a public place [3] without the effective consent of the officer or agency having the legal duty or authority to manage the public place.”<sup>28</sup> HB 1925 defines camping as “resid[ing] temporarily in a place with shelter”—which “includes a tent, tarpaulin, lean-to, sleeping bag, bedroll, blankets, or any form of temporary, semipermanent, or permanent shelter, other than clothing . . . designed to protect a person from weather conditions that threaten personal health and safety”<sup>29</sup>—and measures intent “through evidence of activities associated with sustaining a living accommodation,” including cooking, storing personal belongings for an extended period, or sleeping.<sup>30</sup> Essentially, HB 1925 is written so broadly that it will apply to almost any individual seeking to eat, sleep, or maintain personal belongings in a public place. A violation of these broad provisions is punishable as a Class C misdemeanor, exposing Texans to a fine of up to \$500 and possible arrest for seeking shelter in a public place.<sup>31</sup>

Only the state may grant permission for camping in public areas, subject to conditions and discretion that it will set. Municipalities cannot designate areas for public camping without the state’s approval and they cannot discourage local law enforcement or prosecutorial agencies from enforcing HB 1925’s ban on public camping.<sup>32</sup> If a municipality violates H.B. 1925 or “prohibits or discourages the enforcement of any public camping ban,” the municipality risks losing state grant funds.<sup>33</sup>

However, H.B. 1925 “does not prohibit a policy that encourages diversion or a provision of services in lieu of citation or arrest,” so local governments have flexibility to implement diversion programs consistent with H.B. 1925.<sup>34</sup>

26. Ariz. H.B. 2268 (2021), <https://legiscan.com/AZ/amendment/HB2668/id/101150>.

27. Ga. H.B. 713 (2021), <https://legiscan.com/GA/text/HB713/2021>.

28. Tex. Penal Code. § 48.05(b).

29. Id. at § 48.05(a)(2).

30. Id. at § 48.05(c).

31. Id. at § 48.05(e).

32. Tex. Loc. Govt. Code § 364.002(a) & (b).

33. Id. at § 364.004.

34. Id. at § 364.002(c).

35. Wis. AB 604 (2021), <https://legiscan.com/WI/text/AB604/2021>.

## C. 2022 Legislative Session

This year, the Cicero Institute has continued to work with conservative state legislatures to criminalize homelessness and preempt cities from shifting approaches. Five states considered such bills, with two enacting them into law:



### Arizona SB 1581

SB 1581 conditions \$30 million in grants from the American Rescue Plan on local governments a) establishing “designated camping sites” and b) enacting and enforcing ordinances prohibiting individuals from sleeping or camping in public spaces that are not the “designated camping sites.”<sup>36</sup> The designated camping sites must subject individuals experiencing homelessness to mental health and substance abuse evaluations and remove those who violate rules related to substance abuse. Law enforcement must be integrated into the establishment and maintenance of designated camping zones, whether managed by local governments or nonprofits. This bill died in session.



### Georgia SB 535

Georgia SB 535 was nearly identical to Texas HB 1925. SB 535 would have made it a Class C misdemeanor to “intentionally or knowingly camp[] in a public place”—with similarly broad definitions of camping and measurements of intent—unless in a state-approved designated camping site.<sup>37</sup> Georgia SB 535 also would have prohibited cities from discouraging or refusing to enforce its provision, subject to the loss of all state grant eligibility, though maintaining an exception for local diversion programs.<sup>38</sup> SB 535 died in chambers.



### Missouri HB 1606 (Bill Passed)

Both chambers of the Missouri state legislature considered dual bills—HB 2614 and SB 1106—that would make it a Class C misdemeanor to sleep or camp on public property.<sup>39</sup> There is no exception or provision for state-designated camping sites. HB 2614/SB 1106 would prohibit municipalities from adopting a policy to prohibit enforcement of the camping ban or discouraging prosecutors or police officers from enforcing; HB2614/SB 1106 would also allow the Attorney General to file a civil action against any municipality failing to enforce the camping ban.<sup>40</sup> A municipality could additionally lose state public safety funding if its homelessness population is higher than the state average.<sup>41</sup> The counterpart bills did not progress in chambers, but were eventually folded in to a larger bill HB 1606 that has been passed and enacted.<sup>42</sup>



### Oklahoma SB 1560

Similarly to Texas HB 1925, Oklahoma SB 1560 makes it a misdemeanor to “intentionally or knowingly camp[]” outside of a government-designated camping site.<sup>43</sup> Although SB 1560 similarly prohibits municipalities from discouraging enforcement of its provisions—subject to civil suit and loss of all state grant funds—it affords local housing authorities, rather than state authorities, the power to designate public camping sites and allows encouragement of local diversion programs.<sup>44</sup> SB 1560 died in committee.



### Tennessee SB 1610 (Bill Passed)

Tennessee SB 1610 expands on a 2012 law that had made it a Class E felony to camp on state-owned or private land not designated for camping.<sup>45</sup> SB 1610 extends that felony category to include municipally owned property as well.<sup>46</sup> SB 1610 further makes it a Class C misdemeanor to camp along a state or interstate highway or under an overpass. SB 1610 has been passed and enacted.<sup>47</sup>

36. Ariz. S.B. 1581 (2022), <https://legiscan.com/AZ/text/SB1581/2022>.

37. Ga. S.B. 525 (2022), <https://legiscan.com/GA/text/SB535/2021>.

38. Id.

39. Mo. H.B. 2614 (2022) <https://legiscan.com/MO/text/HB2614/2022>; Mo. S.B. 1106 (2022), <https://legiscan.com/MO/text/SB1106/2022>.

40. Id.

41. Id.

42. Mo. H.B. 1606 (2022), <https://legiscan.com/MO/bill/HB1606/2022>.

43. Okla. S.B. 1560 (2022), <https://legiscan.com/OK/text/SB1560/2022>.

44. Id.

45. See John Jenco, TN Homeless Criminalization Bill Now Law Without Governor’s Signature, WJHL (May 5, 2020), <https://www.wjhl.com/news/local/tn-homeless-criminalization-bill-now-law-without-governors-signature/>.

46. See id.

47. Tenn. S.B. 1610 (2022), <https://legiscan.com/TN/bill/SB1610/2021>.



## Part II Responding to this Trend

We expect state bills criminalizing homelessness to continue to spread. This policy subjects individuals experiencing homelessness, (disproportionately people of color) to criminal penalties—creating a record that could paradoxically impede future housing availability—and requires municipalities to spend stretched resources on criminalization rather than creating viable shelter and housing options.

The Local Solutions Support Center (LSSC) and partner Local Progress want to prepare municipalities to fight back against these policies as they are being considered and to continue to serve people experiencing homelessness even after passage.

Prior to passage, municipalities can emphasize the ineffectiveness and cruelty of criminalizing homelessness through public camping bans.

Even if a state camping ban prevails, municipalities can continue to support individuals experiencing homelessness by developing innovative diversion policies and protecting civil rights. Local Progress intends to launch a companion memo that will offer interim strategies for the homelessness crisis this year.

Homelessness is a growing crisis that state preemption and criminalization will not solve. Local governments need the flexibility and resources to develop care-centered approaches to serve the most vulnerable in their communities.

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