

## NOTES

### PRIVATE BUSINESS FOR YOUR PRIVATE BUSINESS: EXPANDING BATHROOM ACCESS FOR PEOPLE EXPERIENCING HOMELESSNESS BY BANNING CUSTOMERS-ONLY POLICIES

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*For people experiencing homelessness, lack of access to public bathroom facilities often forces the humiliating need to urinate or defecate in public. The bathroom options available to those experiencing homelessness do not meet the population's needs. One solution that scholars and local leaders have proposed is to ban customers-only bathroom policies. Such bans pose difficult legal and political questions. Most significantly, the recent Supreme Court case Cedar Point Nursery v. Hassid—which expanded takings doctrine and made government regulation of access rights more difficult—creates a complex legal roadblock for local lawmakers seeking to ban customers-only bathrooms. The academics, lawmakers, and activists who have discussed limitations or bans on customers-only bathrooms have yet to address the challenge posed by Cedar Point.*

*This Note seeks to fill that gap by analyzing the landscape of takings jurisprudence after Cedar Point. It reaches two related conclusions. First, banning customers-only bathrooms would likely not be a taking. While Cedar Point ostensibly limited a host of access-rights regulations, it carved out several exceptions. Bans on customers-only bathrooms would likely fall into one such exception. The Court's broad holding may thus be less exacting than it appears. Second, regardless of whether these bans are takings, municipal leaders can best serve the public by providing just compensation for the access rights these bans carve out. This solution avoids the indeterminacies of Cedar Point, softens the political blow to business owners, and centers the experience and dignity of those living in homelessness.*

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## INTRODUCTION

Everyone poops.<sup>1</sup> For most Americans, this is an uncomplicated task. Yet for many, finding a place to use the bathroom is a major struggle.<sup>2</sup> For those experiencing homelessness,<sup>3</sup> lack of access to public bathroom

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1. Tarō Gomi, *Everyone Poops* (Amanda Mayer Stinchecum trans., Chronicle Books 2020) (1977).

2. See, e.g., Kim Corona, *How New York City Can Improve Bathroom Access*, City & State N.Y. (Dec. 15, 2021), <https://www.cityandstateny.com/policy/2021/12/how-new-york-city-can-improve-bathroom-access/359812/> [https://perma.cc/X7KZ-FJ63] (“With just 1,103 public restrooms available to use in the city, . . . New Yorkers continue to struggle in accessing clean and working facilities.”).

3. This Note generally uses “people experiencing homelessness” to describe those who lack a “fixed, regular, and adequate nighttime residence.” See HUD, *The 2022 Annual Homelessness Assessment Report (AHAR) to Congress* (pt. 1) 4 (2022), <https://www.huduser.gov/portal/sites/default/files/pdf/2022-AHAR-Part-1.pdf> [https://perma.cc/7D38-MVFQ]. There is no perfect term to describe this population, so this Note uses the most common term—“homeless”—rather than terms such as “houseless” or “unhoused.” See Kayla Robbins, *Homeless, Houseless, Unhoused, or Unsheltered: Which Term Is Right?*, *Invisible People* (Aug. 25, 2022), <https://invisiblepeople.tv/homeless-houseless-unhoused->

facilities often forces the humiliating need to urinate or defecate in public.<sup>4</sup> This issue has been exacerbated by the COVID-19 pandemic.<sup>5</sup> Many bars and restaurants closed their doors or limited access,<sup>6</sup> and public bathrooms in places such as libraries and subway stations have been slow to reopen after shutting down for social distancing.<sup>7</sup> While some of these spaces are now reopening, COVID-19's longer-term effects on the homeless population will continue to reverberate.<sup>8</sup> Further, recent inflation has supercharged the housing affordability crisis, leading shelter officials in fifteen states to report “a dramatic increase in the number of people, particularly single mothers, seeking services” in 2022.<sup>9</sup>

Homelessness has become an “acute crisis.”<sup>10</sup> Unsurprisingly, bathroom access is more strained than ever. In New York City, the closing of bathrooms and the increase in people experiencing homelessness contributed to a near-doubling of public urination complaints during the pandemic.<sup>11</sup> This problem is far more than an inconvenience to the city-dwelling public. For those experiencing homelessness, not having a place to go can result in criminal consequences.<sup>12</sup> And, in the words of one

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or-unsheltered-which-term-is-right/ [https://perma.cc/SVA5-BTM7]. This Note seeks to prioritize the dignity of people experiencing homelessness while keeping in mind that “for housed people who are just looking for a way to help out, policing language isn’t the most helpful thing we could be doing.” Id.

4. See Corona, *supra* note 2.

5. See *id.*

6. See *id.*

7. See Michelle D. Laysner, Edward W. De Barbieri, Andrew J. Greenlee, Tracy A. Kaye & Blaine G. Saito, Mitigating Housing Instability During a Pandemic, 99 Or. L. Rev. 445, 460 (2021) (explaining that some protective measures taken by New York City’s Metropolitan Transit Authority have “eliminat[ed] the overnight shelter that some homeless people had come to rely on”); Clio Chang, For a Brief, Beautiful Moment, We Knew Where to Find a Bathroom in the Subway, *Curbed* (Feb. 17, 2022), <https://www.curbed.com/2022/02/open-nyc-subway-mta-bathrooms.html> [https://perma.cc/TWW4-SG5Q].

8. Data collection efforts on the number of people experiencing homelessness were interrupted during the pandemic. See State of Homelessness: 2023 Edition, Nat’l All. to End Homelessness, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/> [https://perma.cc/2AJW-6AUP] (last visited Sept. 30, 2023). But every indication suggests that “the pandemic has only made the homelessness crisis worse.” HUD, HUD Secretary Fudge on 2020 AHAR: Part 1—PIT Estimates of Homelessness in the U.S., YouTube, at 01:23 (Mar. 18, 2021), <https://www.youtube.com/watch?v=qAC0mm0uMKU> (on file with the *Columbia Law Review*).

9. Abha Bhattarai & Rachel Siegel, Inflation Is Making Homelessness Worse, *Wash. Post* (July 3, 2022), <https://www.washingtonpost.com/business/2022/07/03/inflation-homeless-rent-housing/> (on file with the *Columbia Law Review*).

10. See German Lopez, Homeless in America, *N.Y. Times: The Morning News*l. (July 15, 2022), <https://www.nytimes.com/2022/07/15/briefing/homelessness-america-housing-crisis.html> (on file with the *Columbia Law Review*).

11. Aaron Elstein, No Place to Go, *Crain’s N.Y. Bus.*, <https://www.crainsnewyork.com/special-features/no-place-go-public-bathrooms-nyc> (on file with the *Columbia Law Review*) [hereinafter Elstein, No Place to Go] (last visited Sept. 7, 2023).

12. See *infra* section I.A.1.

formerly homeless person, “[o]ne of the consequences of public urination for homeless people is humiliation.”<sup>13</sup> The criminal and dignitary consequences mean much is at stake for those in need of a place to go. But the bathroom options available to those experiencing homelessness—shelters, public (i.e., municipality-operated) bathrooms, and private bathrooms open to the public (e.g., restaurants and shops)—do not meet the population’s needs.<sup>14</sup>

Scholars and local leaders have considered several possible solutions to this problem. Common refrains call for the construction of more public bathrooms and for the decriminalization of public urination and defecation.<sup>15</sup> One potential stopgap solution has been discussed less frequently: banning customers-only bathroom policies.<sup>16</sup> These bans would prevent businesses of public accommodation—such as restaurants, bars, and shops—from restricting bathroom access to paying customers only.<sup>17</sup>

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13. Corona, *supra* note 2 (internal quotation marks omitted) (quoting Ashley Belcher, an outreach and organizing specialist at a New York City nonprofit).

14. For an excellent analysis of the availability and accessibility of bathrooms for those experiencing homelessness, see Ron S. Hochbaum, *Bathrooms as a Homeless Rights Issue*, 98 N.C. L. Rev. 205, 218–34 (2020) [hereinafter Hochbaum, *Bathrooms and Homeless Rights*]. Shelters often are at capacity, and those with availability often close during the daytime. *Id.* at 219. Further, many experiencing homelessness have valid reasons for avoiding shelters, such as overcrowding; restrictions on possessions, pets, and gender identity; triggers for mental illness; and restrictions on coming and going. See *id.* Municipality-operated bathrooms are too scarce to serve the public’s needs. See *id.* at 223. Many of these bathrooms are difficult to access due to, among other things, daytime-only hours, maintenance and sanitation issues, inadequate signage, inaccessible or inconvenient location, and closure during particular seasons. See *id.* at 227–28. Finally, private businesses often use “For Customers Only” bathroom policies, making their bathrooms inconsistently available to those experiencing homelessness. See *id.* at 219–20.

15. See *id.* at 249–67. One scholar, Richard M. Weinmeyer, has taken calls for more public bathrooms a step further by arguing for a right to public toilets. See Richard M. Weinmeyer, *Lavatories of Democracy: Recognizing a Right to Public Toilets Through International Human Rights and State Constitutional Law*, 26 U. Pa. J. Const. L. (forthcoming 2024) (manuscript at 4) (on file with the *Columbia Law Review*) (“This Article is the first of its kind to propose recognizing state constitutional rights to public bathrooms as a comprehensive first step towards addressing the United States’ public bathroom crisis.”). Others, such as Minneapolis City Council Member Jamal Osman, have called for portable toilets near homeless encampments. See Grace Birnstengel, *Is Providing a Portable Toilet an Endorsement of a Homeless Encampment?*, MPR News (Feb. 1, 2023), <https://www.mprnews.org/story/2023/02/01/is-providing-a-portable-toilet-an-endorsement-of-a-homeless-encampment> [<https://perma.cc/7S7X-UVPA>] (last updated Feb. 3, 2023).

16. See Hochbaum, *Bathrooms and Homeless Rights*, *supra* note 14, at 256–58; see also Taunya Lovell Banks, *The Disappearing Public Toilet*, 50 Seton Hall L. Rev. 1061, 1091 (2020) (“Stronger measures might include requiring all restaurants and bars to make their toilets available to the general public . . .”); Ron Hochbaum, *Opinion, Let’s Ban ‘For Customers Only’ Policies*, S.F. Chron. (Apr. 25, 2018), <https://www.sfchronicle.com/opinion/openforum/article/Let-s-ban-for-customers-only-policies-12865050.php> (on file with the *Columbia Law Review*) [hereinafter Hochbaum, *Banning Customers-Only Policies*].

17. See Hochbaum, *Banning Customers-Only Policies*, *supra* note 16.

While these bans have yet to find success in American cities,<sup>18</sup> they could ease the burden on municipalities and prevent discriminatory exclusion.<sup>19</sup> Scholars—most notably Professor Ron S. Hochbaum—have suggested these bans as a solution to the bathroom-access problem for those experiencing homelessness.<sup>20</sup> Local leaders and community activists have similarly challenged business owners’ right to exclude noncustomers from their bathrooms (though these challenges have been either unsuccessful or more limited than outright bans).<sup>21</sup>

Such bans pose difficult legal and political questions. Most significantly, the recent Supreme Court case *Cedar Point Nursery v. Hassid*<sup>22</sup>—which expanded takings doctrine and made government regulation of access rights more difficult<sup>23</sup>—creates a complex legal roadblock for local lawmakers seeking to ban customers-only bathrooms. The academics, lawmakers, and activists who have discussed limitations or bans on customers-only bathrooms have yet to address the challenge posed by *Cedar Point*. This Note fills that gap by analyzing the landscape of post-*Cedar Point* takings jurisprudence. In doing so, it serves two audiences. First, it serves those seeking to better understand *Cedar Point*’s convoluted takings doctrine. By providing an example of the doctrine’s application to an actual legal problem, it reveals the indeterminacies of the Court’s approach and offers solutions for navigating them. Second, it serves local leaders who seek to alleviate the suffering of those living in homelessness. It lays out a clear pathway for those attempting to take advantage of private bathroom infrastructure by banning customers-only policies.

This Note reaches two related conclusions. First, banning customers-only bathrooms likely would not be a taking.<sup>24</sup> While *Cedar Point* ostensibly limited a host of access-rights regulations, it carved out several exceptions (perhaps to avoid disturbing too much existing legislation).<sup>25</sup> Bans on customers-only bathrooms would likely fall into one such exception. The Court’s broad holding may thus be less exacting than it appears.<sup>26</sup> Second, regardless of whether these bans are takings, municipal leaders can best serve the public by providing just compensation for the access rights that the bans may “take.”<sup>27</sup> This solution avoids the indeterminacies of *Cedar Point*, softens the political blow to business owners, and centers the

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18. See Banks, *supra* note 16, at 1091 (citing Amsterdam as the only city that has banned customers-only bathrooms).

19. See Hochbaum, *Bathrooms and Homeless Rights*, *supra* note 14, at 258–59.

20. See *supra* notes 14, 16 and accompanying text.

21. See *infra* section I.B.

22. See 141 S. Ct. 2063 (2021).

23. See *infra* section II.A.

24. See *infra* section III.A.

25. See *infra* notes 205–206 and accompanying text.

26. See *infra* section III.A.

27. See *infra* section III.B.

experience and dignity of those living in homelessness. It is also more cost-effective than building municipality-operated bathrooms.<sup>28</sup>

This Note proceeds in three parts. Part I summarizes the adverse, discriminatory effects that customers-only policies have on people experiencing homelessness. It then describes past attempts at banning or limiting customers-only policies, concluding that the time for a ban is ripe. Part II addresses potential problems such bans may encounter if attempted in the future. First, it considers whether banning customers-only bathroom policies would amount to a taking under *Cedar Point*. Then, it discusses policy challenges regarding line drawing and enforcement as well as the potential for political backlash. Part III weighs the challenges of bans against their potential upside and provides guidance for municipal leaders who seek to tap into private-business bathroom infrastructure to increase bathroom access.

### I. BACKGROUND: HARM, MOMENTUM, AND STALLED ATTEMPTS

Customers-only bathroom policies have adverse, discriminatory effects on those experiencing homelessness. By excluding the homeless population from using bathrooms operated by private businesses, businesses of public accommodation contribute to the bathroom scarcity for those in need of a place to go.<sup>29</sup> These policies not only lower the total number of available toilets but also tend to exclude noncustomers inconsistently—business owners often discriminate against people on the basis of race, socioeconomic status, gender identity, and other characteristics.<sup>30</sup> This Part addresses the harm done by customers-only bathroom policies. Specifically, it outlines criminal and dignitary harms done to those experiencing homelessness as well as public health harms done to the broader public. It then outlines past attempts at banning or limiting such policies. This Part shows that as people experiencing homelessness are becoming more and more desperate for toilets, proposals to limit business owners' right to exclude are gaining momentum. But this momentum teeters on a knife's edge.

#### A. *Adverse Effects of Customers-Only Bathrooms*

In April 2018, two Black men—Rashon Nelson and Donte Robinson—were arrested after asking to use the bathroom of a Philadelphia Starbucks.<sup>31</sup> They were waiting to meet a business associate

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28. See *infra* section III.B.

29. See *supra* note 14.

30. See Banks, *supra* note 16, at 1067–68.

31. See Matt Stevens, Starbucks C.E.O. Apologizes After Arrests of 2 Black Men, N.Y. Times (Apr. 15, 2018), <https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html> (on file with the *Columbia Law Review*); Emily Stewart, Starbucks Says Everyone's a Customer After Philadelphia Bias Incident, Vox (May 19, 2018), <https://>

and had not yet made a purchase.<sup>32</sup> Starbucks eventually responded to this racist episode by allowing “all guests to use its cafes, including its restrooms, whether or not they make a purchase.”<sup>33</sup> Starbucks banned customers-only bathrooms. In the years since Starbucks enacted this policy, research has shown a “decrease in public urination citations near Starbucks locations relative to other areas . . . . By contrast, a wide range of other minor public order crimes show no significant changes or consistent signs of effects.”<sup>34</sup> These findings strongly suggest that eliminating customers-only bathroom policies would help serve the bathroom needs of the homeless population.

By refusing to offer up their restrooms to the general public, private businesses decline the opportunity to take part in the solution to the bathroom-access problem. The blame, of course, does not fall squarely on private businesses. As Professor Taunya Lovell Banks argues, “[T]he lack of government operated or sponsored free or low-cost public toilets in urban areas, and their replacement with toilets controlled by private business, creates opportunities to discriminate against people seeking access to those toilets . . . .”<sup>35</sup> Municipalities must not be let off the hook for failing to provide government-operated bathrooms.<sup>36</sup> Still, banning customers-only bathrooms would be the “quickest and most cost-effective way to ameliorate the crisis, while protecting the health and dignity of homeless individuals everywhere.”<sup>37</sup>

Reading a “restrooms for customers only” sign, “[o]ne really doesn’t have to wonder who those signs are directed at,” writes Professor John B. Mitchell.<sup>38</sup> Professor Mitchell reflects on the fact that he has, on occasion, “walked past those signs and straight to the washroom.”<sup>39</sup> Many middle- and upper-class readers have likely had similar experiences. Those

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[www.vox.com/identities/2018/5/19/17372164/starbucks-incident-bias-bathroom-policy-philadelphia](http://www.vox.com/identities/2018/5/19/17372164/starbucks-incident-bias-bathroom-policy-philadelphia) [<https://perma.cc/XJ8M-RYV9>].

32. See Stewart, *supra* note 31.

33. Julie Jargon, Starbucks Restrooms Open for All Visitors, *Wall St. J.* (May 19, 2018), <https://www.wsj.com/articles/starbucks-creates-policy-on-nonpaying-guests-1526745600> (on file with the *Columbia Law Review*).

34. Umit G. Gurun, Jordan Nickerson & David H. Solomon, Measuring and Improving Stakeholder Welfare Is Easier Said Than Done 4 (Nov. 15, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3531171> [<https://perma.cc/7HUK-9UT4>]. This research also showed that Starbucks’s policy change has likely had negative effects on its bottom line. *Id.* at 7. The potential for adverse effects on businesses is addressed later in this Note. See *infra* section II.B.2.

35. See Banks, *supra* note 16, at 1067; see also Weinmeyer, *supra* note 15 (manuscript at 22) (noting that under current federal civil rights laws, businesses may discriminate based on “economic classifications”).

36. Hochbaum, Bathrooms and Homeless Rights, *supra* note 14, at 253.

37. Hochbaum, Banning Customers-Only Policies, *supra* note 16.

38. John B. Mitchell, Crimes of Misery and Theories of Punishment, 15 *New Crim. L. Rev.* 465, 485 (2012).

39. *Id.*

privileged enough to look like customers are treated as such.<sup>40</sup> Customers-only bathroom policies are meant to specifically exclude the homeless population.<sup>41</sup> And this exclusion translates to severe criminal and dignitary consequences for those experiencing homelessness.<sup>42</sup>

1. *Criminal Consequences.* — When people are left with no choice but to urinate or defecate in public,<sup>43</sup> they become vulnerable to criminal punishment.<sup>44</sup> Many cities list public urination and defecation as prohibited conduct.<sup>45</sup> In some states, people convicted of public urination or defecation may also be required to register as sex offenders.<sup>46</sup> Sex offenders find it very difficult, if not impossible, to obtain housing.<sup>47</sup> “Buffer zones” around schools and parks render some cities almost entirely off limits for registered sex offenders.<sup>48</sup> And lifetime registered offenders are barred from receiving federally funded housing assistance.<sup>49</sup> The homelessness-

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40. See *id.* (“I might be a customer, if not today then another time. Anyway, customer or not, there’s class recognition and with it class-based courtesy.”).

41. See *id.*; see also Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 *UCLA L. Rev.* 295, 311 (1991) (“Most homeless people do not have jobs and few of them are allowed inside restaurants.”).

42. See Banks, *supra* note 16, at 1068 (arguing that criminalizing public urination in areas without public toilets is “unconscionable” and that the resulting dignitary effects are severe).

43. See Mitchell, *supra* note 38, at 485 (describing a hypothetical situation in which a person experiencing homelessness “urinated in public, not to make a symbolic statement or to offend others, but because she desperately had to piss”).

44. See Banks, *supra* note 16, at 1073–74; see also Justin Olson & Scott MacDonald, *Washington’s War on the Visibly Poor: A Survey of Criminalizing Ordinances & Their Enforcement* 3 (Seattle Univ. Sch. of L., Working Paper No. 15-19, 2015), <https://ssrn.com/abstract=2602318> [<https://perma.cc/ZU9G-TYKQ>] (finding that the majority of cities in Washington State criminalize public urination or defecation while failing to “provide sufficient access to 24-hour restrooms and hygiene centers”).

45. See Nat’l L. Ctr. on Homelessness & Poverty, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* 47 (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/7JUE-SST9>] [hereinafter *Housing Not Handcuffs*] (“[Eighty-three percent] of cities prohibit public urination and/or defecation.”). While some jurisdictions recognize a “necessity” exemption to public urination offenses, these exemptions “depend heavily on notoriously biased police discretion.” See Banks, *supra* note 16, at 1077.

46. See *Housing Not Handcuffs*, *supra* note 45, at 47 (“[I]n some cases, homeless people forced to urinate or defecate in public are also charged with public exposure or public indecency. These may be charged as sex crimes which can come with sex offender registration requirements as well as bans from living in broad areas of many cities.”); Banks, *supra* note 16, at 1073 (citing several public indecency and sex offender statutes to support the claim that some states “require persons convicted of public urination to register as sex offenders”).

47. See Rocket Drew, *Sentenced to Homelessness: The Case for Housing Sex Offenders*, *Brown Pol. Rev.* (Apr. 20, 2019), <https://brownpoliticalreview.org/2019/04/sentenced-homelessness-case-housing-sex-offenders/> [<https://perma.cc/K2MY-Y2BE>].

48. See *id.* (“For example, 93% of residential properties in Newark, New Jersey[,] fall within 2500 feet of a school.”).

49. *Id.*



to-incarceration cycle churns on: “[O]ffenders experiencing housing instability are more likely to be in noncompliance with their registry requirements.”<sup>50</sup> Public urination and defecation charges are just one of the many examples of governments criminalizing homelessness.<sup>51</sup> Governments, not private businesses, are to be blamed for these harsh laws.<sup>52</sup> Yet private business could play a part in blunting their effects. People experiencing homelessness would be subject to these laws less often if they had sufficient bathroom access—a problem that private businesses have the infrastructure to remedy.<sup>53</sup>

2. *Dignitary Consequences.* — Customers-only bathroom policies contribute not only to criminal consequences for those experiencing homelessness but also to dignitary harms. Having no choice but to relieve oneself in public can be humiliating.<sup>54</sup> Moreover, businesses that enforce customers-only bathroom policies legitimize dignitary hierarchies between those who can and cannot pay for bathrooms (and between employees and those seeking to use the bathroom).<sup>55</sup> And, simply put, relieving oneself outside can be an unpleasant experience.

Already-marginalized groups are especially likely to experience dignitary harm from customers-only bathroom policies. People of color face added layers of dignitary harm, as demonstrated by the Philadelphia Starbucks incident.<sup>56</sup> People who menstruate also face an added layer of dignitary (and health-related) harm because they must manage menstruation without access to basic sanitation.<sup>57</sup> And dignitary harms are

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50. *Id.*

51. See Hochbaum, *Bathrooms and Homeless Rights*, supra note 14, at 243–44. Other examples of the criminalization of homelessness include prohibitions on “sitting, lying, and resting in public spaces”; “sleeping, camping, and living in vehicles”; “begging and panhandling”; and “sharing food.” *Id.* at 243; see also *Housing Not Handcuffs*, supra note 45, at 37 (“[L]aws punishing the life-sustaining conduct of homeless people have increased in every measured category since [2006] . . .”).

52. Engagement with calls to reform laws criminalizing homelessness falls beyond the scope of this Note. For an overview of legal reform options, see Hochbaum, *Bathrooms and Homeless Rights*, supra note 14, at 259–67.

53. See supra notes 31–37 and accompanying text.

54. See supra note 13 and accompanying text.

55. See Banks, supra note 16, at 1082 (“Most businesses seldom refuse toilet access to ‘respectably dressed’ middle- or upper-class white people, customers or not. Thus, these members of the policy-making class seldom experience situations where they . . . lack access to a public toilet.”); Hochbaum, *Bathrooms and Homeless Rights*, supra note 14, at 235 (“‘Bathrooms for Customers Only’ signs are now ubiquitous, and employees have become the gatekeepers.”).

56. See supra notes 31–33 and accompanying text; see also Hochbaum, *Bathrooms and Homeless Rights*, supra note 14, at 258 (“These norms are subjectively and selectively enforced and lead to discrimination as demonstrated by the incident at the Philadelphia Starbucks.”).

57. See Hawi Teizazu, Marni Sommer, Caitlin Gruer, David Giffen, Lindsey Davis, Rachel Frumin & Kim Hopper, “Do We Not Bleed?” Sanitation, Menstrual Management,

amplified for transgender people experiencing homelessness, who face the dual challenges of finding a bathroom consistent with their gender identities and finding a bathroom available to the homeless population.<sup>58</sup> Customers-only bathroom policies contribute to the dignitary harms that people experiencing homelessness face every day, and these harms are especially pronounced for already-marginalized groups.

3. *Health, Safety, and Quality of Life.* — Beyond criminal and dignitary consequences for those experiencing homelessness, customers-only bathroom policies contribute to problems with health, safety, and quality of life. First and foremost, when people experiencing homelessness lack access to basic sanitation, they risk health complications.<sup>59</sup> But the public health and quality-of-life concerns extend beyond the homeless population. Failing to properly treat urine and feces subjects the broader public to disease.<sup>60</sup> And finally, public urination and defecation can result in inconvenience and property damage.

#### B. *Past Attempts to Ban or Limit Customers-Only Bathrooms*

Bathroom access is becoming an increasingly salient issue. The New York City Council recently introduced a bill that “aims to quadruple the

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and Homelessness in the Time of COVID, 41 Colum. J. Gender & L. 208, 216–17 (2021) (“Meeting fundamental needs without shame while in public is critical to human dignity in urban settings. Basic sanitation and menstrual management should be leverage enough, but these are parlous times for public health. The realities of COVID-19 add urgency to provision of [public restrooms] . . .”).

58. See Hochbaum, *Bathrooms and Homeless Rights*, supra note 14, at 241 (“[T]he provision and design of bathrooms raises issues for transgender and gender non-conforming individuals. The lack of gender-neutral bathrooms leads to harassment of transgender individuals and frequently puts them in harm’s way.”).

59. See *id.* at 236–37 (“[U]rine retention can lead to urinary tract infections and renal damage. Delays in defecating can lead to ‘constipation, abdominal pain, diverticuli, and hemorrhoids . . .’” (alteration in original) (footnote omitted) (quoting Memorandum from John B. Miles, Jr., Dir., OSHA Directorate of Compliance Programs, to Reg’l Adm’rs. & State Designees, on Interpretation of 29 C.F.R. § 1910.141(c)(1)(i) (Apr. 6, 1988), <https://www.osha.gov/laws-regs/standardinterpretations/1998-04-06-0> [<https://perma.cc/8NS7-SH7V>])); see also Banks, supra note 16, at 1083 (explaining that “OSHA promulgated rules to require employers to provide their employees with toilet facilities so that they will not suffer the adverse health effects that can result if toilets are not available”).

60. See Hochbaum, *Bathrooms and Homeless Rights*, supra note 14, at 236 (“Exposure to urine and feces can result in the transmission of a number of infectious diseases, including salmonella, shigella, hepatitis, tapeworm, and hookworm.”). But see Banks, supra note 16, at 1073 (“[S]ome claim that [the threat of feces to public health] is ‘exaggerated’ and ‘removing refuse—even feces—from the street has much more to do with quality of life than with public health.’” (quoting Laura Norén, *Only Dogs Are Free to Pee: New York Cabbies’ Search for Civility, in Toilet: Public Restrooms and the Politics of Sharing* 93, 105 (Harvey Molotch & Laura Norén eds., 2010))). Even if the public health concerns are exaggerated, quality-of-life concerns present a legitimate public interest.

number of public toilets in New York City by 2035.”<sup>61</sup> But this bill is just another in a long line of attempts to address “New York City’s notorious lack of public restrooms.”<sup>62</sup> Historically, these efforts have stalled out.<sup>63</sup> And eleven years is a long time to wait. San Diego has opted for a different strategy—one that homeless advocates have decried.<sup>64</sup> The San Diego City Council recently prioritized a lobbying campaign “to end the state ban on pay toilets.”<sup>65</sup> This solution might increase access for tourists, but it would ignore the far-more-pressing needs of people experiencing homelessness, who are less likely to pay for use.<sup>66</sup> And the proposed twenty-five-cent fee wouldn’t come close to offsetting the costs of building and operating public bathrooms.<sup>67</sup>

Efforts like these miss a solution hiding in plain sight—the thousands of toilets already existing in shops, cafés, and restaurants.

1. *Outright Bans.* — Banning customers-only bathrooms is a relatively untested idea, at least in the United States.<sup>68</sup> The most notable attempt to ban customers-only bathrooms was made by the Chicago City Council in

61. Lawmakers Push Effort to Increase Public Toilet Access Across NYC, News 12 Bronx (Aug. 3, 2023), <https://bronx.news12.com/lawmakers-push-effort-to-increase-public-toilet-access-across-nyc> [<https://perma.cc/58PC-FYB6>].

62. See Press Release, Mark Levine, Manhattan Borough President, MBP Levine & CM Joseph’s Bill for More Public Bathrooms Crosses the Finish Line in Council (Mar. 12, 2023), <https://www.manhattanbp.nyc.gov/for-immediate-release-3/> [<https://perma.cc/7WGZ-A248>].

63. See Theodora Siegel, Opinion, If New York Is So Great, Why Isn’t There Anywhere to Pee?, N.Y. Times (Jan. 15, 2023), <https://www.nytimes.com/2023/01/15/opinion/new-york-public-toilets.html> (on file with the *Columbia Law Review*) (documenting New York City’s past efforts to install public toilets). New Yorkers have now taken matters into their own hands. Teddy Siegel, an opera student and New York City resident, “created the TikTok account @got2gonyc to share free NYC bathrooms.” See Home, Got2gonyc, <https://www.got2gonyc.com> [<https://perma.cc/3E3E-CQP6>] (last visited Sept. 25, 2023); see also Siegel, *supra*. This TikTok account has grown into a “community of hundreds of thousands of followers” across several social media platforms. Got2gonyc, *supra*. Siegel’s advocacy helped spur the recent bathroom access bill. *Id.*

64. See Phillip Molnar, Could Pay Toilets Work in Downtown San Diego?, San Diego Union-Trib. (Feb. 10, 2023), <https://www.sandiegouniontribune.com/business/story/2023-02-10/could-pay-toilets-work-in-downtown-san-diego> [<https://perma.cc/ZFZ9-H4Q2>] (“Homeless advocates have spoken out against the City Council’s move . . .”). But see Weinmeyer, *supra* note 15 (manuscript at 54) (arguing that bans on “fee-for-service restrooms operate on an antiquated idea of freedom that no longer makes sense”).

65. Molnar, *supra* note 64.

66. See *id.* (“[The homeless] population is unlikely to pay for use, and paid alternatives will likely justify neglecting the underlying problem.” (internal quotation marks omitted) (quoting Austin Neudecker, employee at Weave Grown Partners, a Silicon Valley investment firm)).

67. See *id.* (“Even if all 1,939 downtown homeless paid the expected 25-cent fee, only \$710,000 would be raised per year. This would cover the maintenance cost of just two toilets.” (internal quotation marks omitted) (quoting economist Lynn Reaser)).

68. See Banks, *supra* note 16, at 1091 (citing Amsterdam as the only city that has banned customers-only bathrooms).

2017.<sup>69</sup> The proposed ordinance provided that “[a]ny licensee that provides public toilet facilities to its customers must allow individuals who have an emergency and need to use the toilet facilities to do so without having to make a purchase. Furthermore, a fee cannot be charged for the use of the toilet facilities under these circumstances.”<sup>70</sup> This proposal, championed by Alderman David Moore, ultimately failed to pass<sup>71</sup> due to pressure from city officials.<sup>72</sup>

More recently, the New York City Council “revised the plumbing code in a way that could force more businesses to make their restrooms available to most everyone.”<sup>73</sup> In December 2019, “the New York City Council unanimously voted to adopt Local Law 14 of 2020, to bring the New York City Plumbing Code up to date with 2015 edition of the International Plumbing Code.”<sup>74</sup> In reference to bathrooms provided by private businesses, this revision to the Plumbing Code states, “*The public* shall have access to the required toilet facilities at all times that the building is occupied.”<sup>75</sup> The term “[t]he public” replaced the phrase “[e]mployees,

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69. See Proposed Ordinance for Amendment of Municipal Code Chapter 4-4 by Adding New Section 4-4-340 Requiring Licensed Establishments to Allow Non-Patrons to Use Public Toilet Facilities for Emergency Purposes (Chi., Ill. introduced Apr. 19, 2017), <https://occprodstoragev1.blob.core.usgovcloudapi.net/lsmatterattachmentspublic/4c89c8f3-9ae6-440b-ab11-663d241781c3.pdf> [<https://perma.cc/96U4-PK35>] [hereinafter Proposed Chicago Bathroom Ordinance]; see also Hochbaum, *Bathrooms and Homeless Rights*, *supra* note 14, at 256–57 (discussing the Chicago City Council’s effort to pass a ban on customers-only policies).

70. Proposed Chicago Bathroom Ordinance, *supra* note 69; see also Hochbaum, *Bathrooms and Homeless Rights*, *supra* note 14, at 256–57.

71. See Matter Details for Record Number O2017-3200, Off. of the City Clerk Anna M. Valencia City of Chi. (May 19, 2017), <https://chicityclerkelms.chicago.gov/Matter/?matterId=C062D614-E10D-ED11-82E3-001DD80693B4> [<https://perma.cc/572H-UDXS>].

72. City officials told Alderman Moore that “there was already a regulation ordering businesses to let people walk in and go to the toilet.” John Byrne, *Alderman’s Plan to Make Restaurants Open Their Restrooms to Non-Customers Stalls*, *Chi. Trib.* (July 19, 2017), <https://www.chicagotribune.com/politics/ct-chicago-business-bathroom-public-access-met-20170719-story.html> [<https://perma.cc/U2PX-Y2K3>]. Apparently, these officials were referring to Illinois’s Ally’s Law, which requires businesses to open their bathrooms to people with certain medical conditions. See Hochbaum, *Bathrooms and Homeless Rights*, *supra* note 14, at 257. Ally’s Laws are discussed further in section I.B.2, *infra*. “A plain reading of the ordinance reveals significant differences” between Alderman Moore’s plan and Ally’s Laws. Hochbaum, *Bathrooms and Homeless Rights*, *supra* note 14, at 256–57. One wonders whether this pressure stemmed from political concerns rather than from a fear of adding a redundant law to the books.

73. Elstein, *No Place to Go*, *supra* note 11.

74. Code Revision: Recent Activity, N.Y.C. Dep’t of Bldgs., <https://www.nyc.gov/site/buildings/codes/code-revisions.page> [<https://perma.cc/X34B-HZWZ>] (last visited Oct. 25, 2022).

75. N.Y.C., N.Y., Local Law No. 14, § 403.3.1 (Jan. 10, 2020), [https://www.nyc.gov/assets/buildings/local\\_laws/ll14of2020.pdf](https://www.nyc.gov/assets/buildings/local_laws/ll14of2020.pdf) [<https://perma.cc/CEP3-GSKV>] (emphasis added).

customers, patrons and visitors.”<sup>76</sup> Some, including a former assistant commissioner at the Department of Buildings, thought this change might allow a mayoral administration to interpret the Code as requiring businesses to open their bathrooms to the general public.<sup>77</sup> Despite that possibility, Mayor Eric Adams’s administration declined to read the Code as limiting customers-only bathrooms.<sup>78</sup> Department of Buildings spokesperson Andrew Rudansky made clear that the “change in the plumbing code does not mean that most businesses have to open their bathrooms to passersby” but rather was meant to reflect “the latest thinking from the International Code Council, which said the intent of the revision is for businesses to ‘serve only the people involved with the activities of the establishment.’”<sup>79</sup>

This amendment to the Plumbing Code never amounted to an attempt at banning customers-only bathrooms. Still, local businesspeople’s dismayed reaction to the prospect of a ban<sup>80</sup> may be instructive for lawmakers seeking to make such a change in the future. When it appeared that the Code change might ban customers-only bathrooms, one business leader responded, “If a business wants to provide access to their restroom voluntarily, that’s great, but the government should not start mandating this and should instead build public toilets around the city.”<sup>81</sup>

To date, calls to ban customers-only bathrooms have remained mostly theoretical.<sup>82</sup> Though outright bans have yet to gain traction, attempts at limiting customers-only bathroom policies have found success. Two examples—Ally’s Laws and a New York City law providing bathroom access for delivery workers—may provide a template for future bans.

2. *Limiting Customers-Only Bathrooms: Ally’s Laws and Delivery Workers.* — Some state laws already limit business owners’ right to exclude people from their bathrooms. Many states have laws known as “Restroom Access Acts” or “Ally’s Laws,” which “require businesses to open employee

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76. *Id.*

77. Elstein, *No Place to Go*, *supra* note 11.

78. Aaron Elstein, *City Won’t Force Restaurants to Open Restrooms to the Public*, *Crain’s N.Y. Bus.* (Mar. 21, 2022), <https://www.craigslist.com/hospitality-tourism/new-york-city-wont-force-restaurants-open-restrooms-public> (on file with the *Columbia Law Review*) [hereinafter Elstein, *City Won’t Force Restaurants*].

79. *Id.* (first quoting Rudansky; then quoting Int’l Code Council, *International Plumbing Code* § 403.3 (3d printing ed. 2015), [https://codes.iccsafe.org/s/IPC2015\\_NY/chapter-4-fixtures-faucets-and-fixture-fittings/IPC2015-Ch04-Sec403.3](https://codes.iccsafe.org/s/IPC2015_NY/chapter-4-fixtures-faucets-and-fixture-fittings/IPC2015-Ch04-Sec403.3) [<https://perma.cc/EH9R-569R>]).

80. According to reporter Aaron Elstein, “When informed of the looming code change, business owners were appalled.” Elstein, *No Place to Go*, *supra* note 11.

81. *Id.* This same *New Yorker* called a potential ban of customers-only bathrooms an “additional burden” on small businesses. Elstein, *City Won’t Force Restaurants*, *supra* note 78.

82. See *supra* notes 16–19 and accompanying text (describing academic calls to ban customers-only bathrooms but a lack of traction in American cities).

bathrooms to members of the public with eligible medical conditions.”<sup>83</sup> Such medical conditions typically include “Crohn’s disease, ulcerative colitis, any other inflammatory bowel disease, irritable bowel syndrome, or any other medical condition that requires immediate access to a toilet facility.”<sup>84</sup> These laws typically require that the person seeking bathroom access provides some kind of proof of medical condition, such as a doctor’s note.<sup>85</sup> A more robust ban on customers-only bathroom policies would differ in scope—but not necessarily in kind—from Ally’s Laws. An exception for individuals with eligible conditions is only narrower in scope (applying to those with more urgent needs) than bans applying to the general public. The two policies are similar in kind in that they both would limit business owners’ right to exclude people with legitimate needs for bathroom access. The fact that one can “hold it” longer than a person with Crohn’s disease does not make their eventual need any less legitimate. If one waits long enough, the very fact of being human becomes a “condition that requires immediate access to a toilet facility.”<sup>86</sup> And for those experiencing homelessness, reaching that point in a public setting is only a matter of time.

A more recent development in bathroom access was a New York City amendment that was “sparked by . . . the demands of Los Deliveristas Unidos, a labor group representing thousands of delivery workers.”<sup>87</sup> This

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83. Hochbaum, *Bathrooms and Homeless Rights*, supra note 14, at 255–56; see also Weinmeyer, supra note 15 (manuscript at 25) (“Restroom access acts . . . have been enacted in nineteen states and the District of Columbia and grant emergency entrance to a business’s employee restrooms should there be no public restroom available in the vicinity.”).

84. Tenn. Code Ann. § 68-15-303(b)(2) (2022); see also Hochbaum, *Bathrooms and Homeless Rights*, supra note 14, at 255–56. Under most Ally’s Laws, businesses that refuse to provide bathroom access to eligible individuals are subject to fines. Hochbaum, *Bathrooms and Homeless Rights*, supra note 14, at 256; see also, e.g., 410 Ill. Comp. Stat. Ann. 39/20 (West 2022) (establishing a fine of “not more than \$100”); Wis. Stat. & Ann. § 146.29(5) (a) (2022) (establishing a fine of “not more than \$200”). For a sampling of other state Ally’s Laws, see, e.g., Colo. Rev. Stat. § 25-41-101 (2023); Conn. Gen. Stat. Ann. § 19a-106a (West 2022); Del. Code tit. 16, §§ 3001H–3006H (2023); Md. Code Ann., Health-Gen. § 24-209 (West 2023); Mass. Gen. Laws Ann. ch. 270, § 26 (West 2023); Minn. Stat. § 325E.60 (2022); Tex. Health & Safety Code Ann. § 341.069 (West 2023). Unfortunately, Ally’s Laws “appear to be largely ineffective in terms of enforcement.” Weinmeyer, supra note 15 (manuscript at 25–26). For more on enforcement problems and solutions, see *infra* section II.B.1; *infra* notes 239–240 and accompanying text.

85. See Hochbaum, *Bathrooms and Homeless Rights*, supra note 14, at 256. In the United Kingdom, disabled people can request or purchase something called a “RADAR key” from many local government authorities. See Helen Dolphin, *RADAR Keys Explained: What Are They, Where Can I Use Them and How Do I Get One?*, Motability (Nov. 15, 2022), <https://news.motability.co.uk/everyday-tips/radar-keys-explained-what-are-they-where-can-i-use-them-and-how-do-i-get-one/> [<https://perma.cc/988F-NQB5>]. These keys can be used to access locked, accessible toilets in many public and commercial establishments, which prevents the humiliating need to request bathroom access or provide proof of disability. *Id.*

86. Tenn. Code Ann. § 68-15-303(b)(2).

87. Claudia Irizarry Aponte, *Delivery Workers Cheer Restroom Access and Tip Transparency Alongside AOC and Chuck Schumer*, *The City* (Jan. 23, 2022),

amendment to section 20-563.6(b) of the New York City Administrative Code<sup>88</sup> requires that third-party delivery apps (such as Grubhub and DoorDash) “[h]ave written agreements with restaurants” that “must contain a provision requiring the restaurant to allow bathroom access to delivery workers.”<sup>89</sup> Importantly, this law functions quite differently from Ally’s Laws in that it requires third-party apps to contract for bathroom access with other businesses as a licensing condition.<sup>90</sup> It is not a direct imposition of bathroom access by the government on restaurants. Still, this law indicates growing support for limitations on business owners’ right to exclude people from bathrooms.

This growing support offers lawmakers a window of opportunity to ban customers-only bathrooms. But this window will not last forever. Starbucks is already reconsidering its open-bathrooms policy, and some locations have begun to limit access again.<sup>91</sup> Starbucks CEO Howard Schultz has framed this reconsideration as a safety concern,<sup>92</sup> though fear of damage to the company’s bottom line is likely a factor as well.<sup>93</sup> Starbucks has provided a valuable service to the public and especially to

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<https://www.thecity.nyc/work/2022/1/23/22898143/delivery-workers-restroom-access-aoc-schumer> [<https://perma.cc/E2Q9-JRP8>]; see also N.Y.C., N.Y., Local Law No. 117 (Oct. 25, 2021), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=10437960&GUID=F273405C-CF72-4586-B7C9-96553047045D> [<https://perma.cc/CN4-L8ZV>].

88. N.Y.C., N.Y., Admin. Code § 20-563.6 (2022).

89. Press Release, N.Y.C. Dep’t of Consumer & Worker Prot., Mayor Adams, Department of Consumer and Worker Protection Announce New Protections for Food Delivery Workers (Apr. 21, 2022), <https://www1.nyc.gov/site/dca/media/pr042122-Adams-DCWP-New-Protections-for-Food-Delivery-Workers.page> [<https://perma.cc/6MMG-H2LG>].

90. N.Y.C., N.Y., Admin. Code §§ 20-563.1–.2, .6(b).

91. See Lauren Aratani, Starbucks Under Pressure to Keep Restrooms Open to Public, *The Guardian* (Nov. 18, 2022), <https://www.theguardian.com/business/2022/nov/18/starbucks-under-pressure-restrooms-open-public> [<https://perma.cc/8XQH-W8YN>] (“‘Let the people go!’ an activist group is telling Starbucks after the coffee chain’s boss threatened to close down its bathrooms.”).

92. See *id.* (noting that “[w]hile Schultz did not specify what problems the business has been having with its open-restroom policy, Schultz said the company has to ‘harden our stores and provide safety for our people’” (quoting N.Y. Times Events, Starbucks’s C.E.O. Howard Schultz on Unions, China, Mental Health and Bathrooms, YouTube, at 20:31 (June 10, 2022), <https://www.youtube.com/watch?v=FUXpuhci9qI&t=1234s> (on file with the *Columbia Law Review*))). In some cases, safety concerns may be valid. But these concerns largely fall outside the scope of this Note. To the degree that those in crisis pose a threat to others, they are not necessarily more dangerous inside a bathroom than on the sidewalk or the train. Addressing safety concerns (both for those living in homelessness and for the broader public) is important work that requires proactive and lasting solutions to the broader problem of homelessness and its many complex causes. For a survey of research on homelessness and an especially helpful overview of research on “housing first” policies, see Brendan O’Flaherty, *Homelessness Research: A Guide for Economists (and Friends)*, 44 *J. Hous. Econ.* 1, 2–3 (2019).

93. See Gurun et al., *supra* note 34, at 4 (finding that Starbucks’s policy change may have driven away some paying customers).

those experiencing homelessness, but it has done so largely on its own.<sup>94</sup> Starbucks's efforts must be bolstered by spreading the burden of bathroom provision across similar places of public accommodation. Lawmakers must act quickly to capitalize on recent momentum before the window of opportunity passes. If local leaders don't press forward, they may well be forced backward.

## II. CAUSES FOR CONCERN

The drafting of the New York City amendment for delivery workers likely avoids any confrontation with *Cedar Point Nursery v. Hassid* because the municipality does not directly carve out any access right from private businesses.<sup>95</sup> Bans on customers-only bathrooms, however, may be more susceptible to a *Cedar Point* challenge. Further, these bans could run into political and practical problems that may cause headaches for lawmakers. Part II problematizes bans on customers-only bathrooms while pointing toward potential solutions, which Part III further fleshes out.

### A. Cedar Point and Access Rights

In *Cedar Point*, the Supreme Court held that a California regulation—which provided a “right to take access” to an agricultural employer’s property for up to three hours per day, 120 days per year<sup>96</sup>—was a “*per se* physical taking under the Fifth and Fourteenth Amendments.”<sup>97</sup> The Takings Clause of the Fifth Amendment prohibits the taking of private property “for public use, without just compensation.”<sup>98</sup> Some takings, such

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94. See Christopher Bonanos, *Outsourcing Public Bathrooms to Starbucks Maybe Wasn't the Best Idea*, *Curbed* (June 10, 2022), <https://www.curbed.com/2022/06/starbucks-closing-public-restrooms-toilets-locked-schultz.html> [<https://perma.cc/C2CN-2ZWL>] (“You can, if you are cross-eyed and cross-legged with desperation, despoil the corner of a building or subway station, risking a summons. Or you can do what most of us do, which is find a Starbucks.”).

95. See 141 S. Ct. 2063, 2080 (2021) (“The access regulation grants labor organizations a right to invade the growers’ property. It therefore constitutes a *per se* physical taking.”). Even if the New York amendment were read to carve out an access right from restaurants, it would still likely pass through a *Cedar Point* analysis unscathed because governments “may require property owners to cede a right of access as a condition of receiving certain benefits . . . such as a permit, license, or registration.” *Id.* at 2079. In this case, conditioning the licensure of third-party food delivery apps (and with the licensure, the benefit that restaurants receive from these services) on bathroom access would likely fall under this exception. For more detail on the standards for showing that a regulation is not a taking because it is a condition of a government benefit, see *infra* text accompanying notes 194–196.

96. Cal. Code Regs. tit. 8, § 20900 (2021).

97. *Cedar Point*, 141 S. Ct. at 2069, 2080; see also U.S. Const. amends. V, XIV.

98. U.S. Const. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. See, e.g., *Cedar Point*, 141 S. Ct. at 2071.



as the condemnation of land for infrastructure projects, are clear-cut.<sup>99</sup> Others are more subtle and involve regulations under a state's police power that go "too far" in interfering with a property owner's rights.<sup>100</sup> Suspect regulations are subject to the balancing test laid out in *Penn Central Transportation Co. v. City of New York* to determine whether the regulation amounts to a taking (and thus whether the government must pay just compensation).<sup>101</sup> Though regulations that may go "too far" are subject to the *Penn Central* test, "a permanent physical occupation of property is a taking" per se.<sup>102</sup> Per se takings are not subject to *Penn Central*'s balancing test,<sup>103</sup> which is quite permissive toward government regulation.<sup>104</sup>

In *Cedar Point*, the Court expanded the realm of per se takings to include the granting of an ongoing access right<sup>105</sup>—even one that can be exercised only intermittently.<sup>106</sup> In its decision, the Court emphasized the importance of a property owner's "right to exclude," calling it "'one of the most treasured' rights of property ownership."<sup>107</sup> "We cannot agree," the Court reasoned, "that the right to exclude is an empty formality, subject to modification at the government's pleasure."<sup>108</sup> At first glance, *Cedar Point* looks fatal to attempts at banning customers-only bathrooms.<sup>109</sup> Such bans

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99. See *Cedar Point*, 141 S. Ct. at 2071 ("[P]hysical appropriations constitute the 'clearest sort of taking,' and we assess them using a simple, *per se* rule: The government must pay for what it takes." (citation omitted) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001))).

100. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); see also *Cedar Point*, 141 S. Ct. at 2072 ("Our cases have often described use restrictions that go 'too far' as 'regulatory takings.'").

101. See 438 U.S. 104, 124 (1978) ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance."). When conducting a *Penn Central* analysis, courts weigh factors "such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

102. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

103. See *Cedar Point*, 141 S. Ct. at 2072 ("Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.").

104. See Thomas W. Merrill & Henry E. Smith, *The Oxford Introductions to U.S. Law: Property* 255 (Dennis Patterson ed., 2010) (noting that the *Penn Central* test "has generally been fatal to regulatory takings claims").

105. See *Cedar Point*, 141 S. Ct. at 2079–80 ("None of these considerations undermine our determination that the access regulation here gives rise to a *per se* physical taking. Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers' land.").

106. See *id.* at 2075 ("[W]e have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous.").

107. *Id.* at 2072 (quoting *Loretto*, 458 U.S. at 435).

108. *Id.* at 2077.

109. Or, rather, fatal to *uncompensated* bans on customers-only bathrooms. See *infra* section III.A.

would modify a business owner's "right to exclude," creating an access right for members of the public who need to use the bathroom.

The Court, however, carved out three exceptions to the general rule that an ongoing access right is a per se taking. First, "[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right."<sup>110</sup> Second, "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."<sup>111</sup> Among the "background restrictions" the Court cited were "traditional common law privileges to access private property" such as the doctrines of "public or private necessity."<sup>112</sup> And finally, "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."<sup>113</sup> Relying on this conditioning-benefits exception, the Court reasoned that "government health and safety inspection regimes will generally not constitute takings."<sup>114</sup>

Aside from these three exceptions, the *Cedar Point* Court also made sure to distinguish its decision from *PruneYard Shopping Center v. Robins*.<sup>115</sup> In that case, the Court reviewed a decision from the California Supreme Court that "held that the State Constitution protected the right to engage in leafleting at the PruneYard, a privately owned shopping center."<sup>116</sup> The question before the Court was whether this protection amounted to a taking by going "too far" in its regulation of the shopping center's right to exclude the leaflet distributors.<sup>117</sup> The Court conducted a *Penn Central* balancing test and determined that while there had been a literal "taking" of "the right to exclude others," it did not go "too far."<sup>118</sup> In *Cedar Point*, the Court distinguished its holding from *PruneYard* on the ground that "the PruneYard was open to the public, welcoming some 25,000 patrons a day."<sup>119</sup> Importantly, the Court stressed that "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade

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110. *Cedar Point*, 141 S. Ct. at 2078.

111. *Id.* at 2079.

112. *See id.*

113. *Id.*

114. *Id.*

115. 447 U.S. 74 (1980); see also Abigail K. Flanigan, Note, Rent Regulations After *Cedar Point*, 123 Colum. L. Rev. 475, 496 (2023) ("By distinguishing a previous Supreme Court precedent, *Pruneyard Shopping Center v. Robins*, the Court also implicitly introduced a fourth exception." (footnote omitted)).

116. *Cedar Point*, 141 S. Ct. at 2076 (citing *PruneYard*, 447 U.S. at 78).

117. *See PruneYard*, 447 U.S. at 82–83.

118. *Id.* at 82–85.

119. *Cedar Point*, 141 S. Ct. at 2076 (citing *PruneYard*, 447 U.S. at 77–78).

property closed to the public.”<sup>120</sup> Thus, the extent to which the public already has access to a given property may determine whether a per se taking has occurred. While bans on customers-only bathrooms would apply to businesses that are “generally open to the public,” the specific area in question—the bathroom—has traditionally been subject to more stringent exclusions. These bans lie somewhere between the holdings of *Cedar Point* and *PruneYard*.<sup>121</sup>

Given the recent judicial zeal for protecting the “right to exclude,” bans on customers-only bathrooms may face an uphill battle. To avoid a takings challenge, lawmakers must either situate bans within one of the three exceptions outlined above or frame their case as more like *PruneYard* than *Cedar Point*. Part III lays out a roadmap for lawmakers looking to chart a path through *Cedar Point*’s hazy doctrine. But first, a few more potential problems.

#### B. *Practical and Political Problems*

Aside from the potential for takings litigation, bans on customers-only bathrooms are likely to raise other issues. Practically, these bans would need to deal with line-drawing and enforcement challenges. And, as the New York City amendment to the Plumbing Code demonstrated, political backlash from business owners is possible (and perhaps likely).<sup>122</sup> This section addresses these problems.

1. *Line Drawing and Enforcement.* — Which businesses would bans apply to? This presents a difficult line-drawing question for lawmakers. Generally, these bans could apply to businesses offering goods or services to customers on a walk-in basis. But banning customers-only bathrooms in all businesses of public accommodation<sup>123</sup> might be overinclusive. After all, “property law has long protected an owner’s expectation that he will be relatively undisturbed at least in the possession of his property.”<sup>124</sup> For some businesses of public accommodation, bans would be more disruptive

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120. *Id.* at 2077; see also *Horne v. Dep’t of Agric.*, 576 U.S. 351, 364 (2015) (“[I]n *PruneYard* . . . we held that a law limiting a property owner’s right to exclude certain speakers from an *already publicly accessible* shopping center did not take the owner’s property.” (emphasis added)).

121. See *infra* note 214 and accompanying text for an analysis of the relevant property unit for *PruneYard* purposes.

122. See *supra* notes 80–81 and accompanying text.

123. See Hochbaum, *Banning Customers-Only Policies*, *supra* note 16 (pointing to “businesses of public accommodation, such as restaurants,” as places with the existing bathroom infrastructure to meet the needs of the homeless population); see also, e.g., *Protections in Places of Public Accommodation Under the New York State Human Rights Law*, N.Y. State Div. of Hum. Rts., <https://dhr.ny.gov/protections-places-public-accommodation-under-new-york-state-human-rights-law> [<https://perma.cc/VH7C-4Q8N>] (last visited Sept. 25, 2023) (describing places of public accommodation as including, but not limited to, health clinics, hotels, movie theaters, restaurants and bars, and retail stores).

124. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

of expectations regarding property rights. For example, a restaurant that consistently fills up its nightly slate of reservations would find its expectations deeply unsettled by a ban on customers-only bathrooms. On the other hand, some businesses might already allow the general public to use their bathrooms, by either formal policy<sup>125</sup> or informal practice.<sup>126</sup> Takings questions aside, lawmakers will likely want to maintain some level of stability in their constituents' expectations. Determining who's in and who's out—and sufficiently defining these categories for the sake of clear legislation—will prove difficult. Lawmakers could address these challenges by restricting the class of affected businesses. Municipalities might already have zoning classifications or other statutes that could help define the relevant subgroup of businesses. If not, laws banning customers-only bathrooms could include exemptions. For example, statutory language could exempt establishments that require reservations.<sup>127</sup>

Enforcing these bans also presents a challenge. Most Ally's Laws contain provisions for fining noncompliant businesses.<sup>128</sup> Such a provision might work for outright bans on customers-only bathroom policies, but the greater potential for pushback might make enforcement less straightforward. Making matters more complicated, those who would stand to benefit most from the bans—people experiencing homelessness—may be among the least likely to learn about changes in municipal policy.<sup>129</sup> These bans' intended beneficiaries would likely struggle to enforce their rights given the discrimination they already face. Business owners might generally comply with the bans but press their luck with people who are visibly

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125. See *supra* notes 31–33 and accompanying text (describing Starbucks's policy of allowing noncustomers to use café bathrooms).

126. See *supra* notes 38–40 and accompanying text (describing how customers-only policies are informally directed only at those who do not look like customers).

127. See *infra* section III.B for further discussion on restricting the affected class of businesses. Absent preexisting definitions, subgroups of businesses could be defined by statute. This language could be borrowed from other jurisdictions. For example, New York City's Administrative Code defines a "fast food establishment" as:

[A]ny establishment (i) that has as its primary purpose serving food or drink items; (ii) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out or delivered to the customer's location; (iii) that offers limited service; (iv) that is part of a chain; and (v) that is one of 30 or more establishments nationally . . . .

N.Y.C., N.Y., Admin. Code § 20-1201 (2022).

128. See *supra* note 84.

129. Cf. Leonie Milder, Digital Exclusion of the Homeless in America: COVID-19's Impact, *Diggit Mag.* (Sept. 4, 2021), <https://www.diggitmagazine.com/articles/digital-exclusion-homeless-america-covid-19s-impact> [<https://perma.cc/AX5K-J3HG>] ("Many [people experiencing homelessness] are not, or barely, able to access or use digital media in order to enjoy the countless possibilities they have to offer.").

homeless or those presenting with symptoms of mental illness.<sup>130</sup> Moreover, many people experiencing homelessness have grown accustomed to the law working against them, making them less likely to seek out legal recourse.<sup>131</sup>

2. *Political Backlash.* — Along with practical policymaking problems, business owners are likely to react negatively to bans on customers-only bathrooms.<sup>132</sup> They may have some reason to react with skepticism. Research on Starbucks's change in bathroom policy indicates that the "policy had a direct effect that was costly to Starbucks, particularly in locations closer to homeless shelters."<sup>133</sup> After implementing the change, Starbucks locations saw a decrease in both customer volume and the duration of customer visits relative to other coffee shops.<sup>134</sup> Importantly, however, this research studied the effects of just one company's change in bathroom policy.<sup>135</sup> The beauty of an across-the-board ban on customers-only bathrooms lies in its potential for burden spreading.<sup>136</sup> Business owners may counter that "providing access to public bathrooms is the responsibility of government and not private business."<sup>137</sup> Lawmakers must be prepared to respond to these concerns with reassurance, leadership, and a commitment to being a part of the solution.

Lawmakers who hope to ban customers-only bathroom policies have their work cut out for them. Part III provides guidance for addressing the legal, political, and practical concerns over banning customers-only bathrooms.

### III. CHARTING A PATH FORWARD

A ban on customers-only bathrooms must successfully navigate the challenges of *Cedar Point* while dealing with practical and political roadblocks. Municipal leaders should carefully weigh the upside of such bans against their political and legal risks. Further, lawmakers must avoid making bathroom access *someone else's problem*. Rather, local governments should work alongside local businesses to care for people experiencing homelessness.

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130. See supra notes 38–42 and accompanying text (describing the discriminatory application of bathroom policies).

131. The author worked as a case manager at a homeless shelter during the COVID-19 pandemic. Several of his clients reported feeling "jerked around" (and similar sentiments) by the government and legal institutions.

132. See supra notes 80–81 and accompanying text.

133. Gurun et al., supra note 34, at 4.

134. See id. at 3.

135. See id. at 1.

136. See Hochbaum, Banning Customers-Only Policies, supra note 16 ("[A] law that requires all businesses to open up their bathrooms minimizes the cost for any one business.").

137. Id.; see also supra note 81 and accompanying text.

This Part offers two options for municipal leaders to consider. First, governments could ban customers-only bathroom policies without compensating businesses. This option would require a strong legal defense to potential takings claims under *Cedar Point*. To signal their participation in bathroom access efforts, governments could supplement this policy by building more publicly operated bathrooms. Second, governments could ban customers-only bathrooms *and* compensate businesses for the cost of operating essentially public bathrooms. This route would avoid any potential takings challenges and could assuage political backlash. Ultimately, lawmakers, business owners, and business patrons alike must bear in mind the needs of society's most vulnerable—considering the obligations each person might owe to those in need.<sup>138</sup>

#### A. *Uncompensated Bans*

Proponents of bans on customers-only bathrooms likely have three arguments that such bans are not per se takings and that “just compensation” is not due under the Fifth Amendment.<sup>139</sup> First, proponents could rely on the doctrines of public and private necessity—two of the “longstanding background restrictions on property rights” carved out in *Cedar Point*.<sup>140</sup> Second, proponents could push for laws that condition certain health and safety benefits on the abolition of customers-only bathroom policies. And third, proponents could stress that bans would apply only to businesses “generally open to the public,”<sup>141</sup> situating these bans as closer to *PruneYard*<sup>142</sup> than to *Cedar Point*. By preemptively guarding against takings challenges, municipalities could save money by avoiding payment of “just compensation.”<sup>143</sup> This option might be especially desirable for resource-strapped cities.

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138. Gregory S. Alexander's human flourishing theory of property provides one compelling framework for thinking through the obligations that come with owning property. See Gregory S. Alexander, *Ownership and Obligation: The Human Flourishing Theory of Property*, 43 H.K. L.J. 451, 458–59 (2013). This framework posits that because human beings depend on one another for human flourishing, property owners owe certain obligations to “support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible.” *Id.* at 458. These obligations are “inherent in the concept of” property ownership. *Id.* at 453. Under Professor Alexander's theory, the right to exclude is limited by the obligations property owners owe to other members of society, and the state may “be obligated to step in to compel the wealthy to share their surplus with the poor so that the latter can develop the necessary capabilities” for human flourishing. *Id.* at 452, 458.

139. U.S. Const. amend. V.

140. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021).

141. *Id.* at 2077.

142. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

143. U.S. Const. amend. V.

1. *Necessity*. — In *Cedar Point*, the Court carved out exceptions to its broad holding.<sup>144</sup> “[M]any government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights,” the Court reasoned.<sup>145</sup> “These background limitations . . . encompass traditional common law privileges to access private property,” such as allowing “individuals to enter property in the event of public or private necessity.”<sup>146</sup> Municipalities could avoid compensating private businesses for the access right to their bathrooms by situating bans as “consistent with” the “longstanding background restrictions” of private and public necessity.<sup>147</sup>

When the Court referenced public and private necessity, it cited to its 1992 case *Lucas v. South Carolina Coastal Council*<sup>148</sup> as well as the Restatement (Second) of Torts.<sup>149</sup> But the Court did not clarify which formulation of “traditional common law privileges” applies in takings cases.<sup>150</sup> For example, should state courts look to their own common law to determine such privileges or to federal formulations of private property? Or both? Two terms after *Cedar Point*, in *Tyler v. Hennepin County*, the Court clarified that while state law is an important source of property rights, it “cannot be the only source” because “[o]therwise, a State could ‘sidestep the Takings Clause by disavowing traditional property interests’ in assets it wishes to appropriate.”<sup>151</sup> To avoid this dilemma, the Court added “historical practice” and Supreme Court precedent to the list of places to look for “‘existing rules or understandings’ about property rights.”<sup>152</sup>

In *Lucas*, the Court considered whether “background principles of the State’s law of property and nuisance already place[d] upon land

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144. *Cedar Point*, 141 S. Ct. at 2079.

145. *Id.*

146. *Id.* (citing Restatement (Second) of Torts §§ 196–197 (Am. L. Inst. 1964)).

147. *See id.*

148. *See id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992)).

149. *See id.* (citing Restatement (Second) of Torts §§ 196–197).

150. *See id.*

151. 143 S. Ct. 1369, 1375 (2023) (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998)).

152. *Id.* (quoting *Phillips*, 524 U.S. at 164). It’s worth pausing for a moment to insist that the Court is still being less than straightforward. The Court drew its rule from *Phillips*, which understandably reasons that “a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized *under state law*.” *Phillips*, 524 U.S. at 167 (emphasis added because the Court neglected to finish the sentence in *Tyler*). In *Phillips*, the Court considered state law to be the primary definer of property rights because the federal “Constitution protects rather than creates property interests.” *Id.* at 164. But now, according to *Tyler*, the Court’s understanding of “historical practice” not only *protects* property rights but also helps *define* them. *See Tyler*, 143 S. Ct. at 1375–76. And the Court isn’t simply concerned with the “historical practice” within the applicable state. Rather, it now looks to characters such as King John’s thirteenth-century sheriffs and bailiffs. *Id.* at 1376. Despite this lack of clarity, litigants should still cite state law as an especially important source of property rights, just like this Note does in notes 164–177 and accompanying text, *infra*.

ownership” limited the owner’s title, suggesting that the doctrine of necessity might similarly apply in takings cases.<sup>153</sup> The Court limited “the relevant category of laws that would satisfy the exception to those that track the common law” and then “remanded the case to the South Carolina courts for a determination of whether the conduct at issue . . . would constitute a nuisance under South Carolina common law.”<sup>154</sup> Given that the *Cedar Point* majority drew its concept of “background limitations” in part from *Lucas*, it follows that state law applies when determining what constitutes public and private necessity. Similarly, the Restatement (Second) of Torts draws its doctrine largely from state law.<sup>155</sup> So while the Supreme Court has recently begun to develop its own conception of private property under federal constitutional law,<sup>156</sup> the question of what constitutes public and private necessity should be answered by looking first to state common law.

Proponents of bans on customers-only bathrooms could find one justification for such bans by looking to common law necessity doctrines as formulated by state courts. According to section 197 of the Restatement (Second) of Torts, “[o]ne is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to . . . the actor, or his land or chattels, or . . . the other or a third person, or the land or chattels of either.”<sup>157</sup> This is the doctrine of private necessity. While the Restatement imposes potential liability for harm done in the exercise of this privilege, this liability was not particularly relevant to the Court’s *Cedar Point* opinion. For the Court, the salient point seems to be that the regulation must simply be grounded in “longstanding background restrictions,” one of which is “entry to avert serious harm to a person.”<sup>158</sup> In such cases, the government does not owe compensation.<sup>159</sup>

Urination and defecation are, of course, medical necessities.<sup>160</sup> Those without housing and no place to use the bathroom are left with a dire set

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153. *Lucas*, 505 U.S. at 1029 & n.16.

154. Thomas W. Merrill, Choice of Law in Takings Cases, 8 Brigham-Kanner Prop. Rts. J. 45, 50 (2019) [hereinafter Merrill, Choice of Law]; see also *Lucas*, 505 U.S. at 1031 (“The question, however, is one of state law to be dealt with on remand.”).

155. See *Cedar Point*, 141 S. Ct. at 2079 (citing Restatement (Second) of Torts §§ 196–197 (Am. L. Inst. 1964)); see also Shyamkrishna Balganesh, Relying on Restatements, 122 Colum. L. Rev. 2119, 2120 (2022) (noting that Restatements “initially focused on state common law areas”).

156. See *supra* notes 151–152 and accompanying text; see also Merrill, Choice of Law, *supra* note 154, at 54 (discussing the majority opinion in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), which “adopted a federal constitutional-law solution” in determining the meaning of a “parcel” for the purpose of takings cases).

157. Restatement (Second) of Torts § 197(1)(a)–(b).

158. *Cedar Point*, 141 S. Ct. at 2079.

159. *Id.*

160. See *supra* note 59.



of choices: hold it (risking severe medical complications and, in extreme cases, death);<sup>161</sup> urinate or defecate in public (damaging public<sup>162</sup> or private property); or soil themselves (damaging their own “chattels”).<sup>163</sup> Case law discussing bathroom needs as a necessity defense is sparse. *Commonwealth v. Magadini*, a case decided by the Massachusetts Supreme Judicial Court, alludes to the possibility of such a defense.<sup>164</sup> The case dealt with a criminal trespass charge rather than tortious trespass,<sup>165</sup> but the accompanying necessity defense may be analogous enough to the tort version cited by the *Cedar Point* majority to count as a “background limitation” on the right to exclude.<sup>166</sup> The defendant, David Magadini, was charged with criminal trespass for entering private businesses during several particularly cold Massachusetts days.<sup>167</sup> As a person experiencing homelessness, Magadini argued that he had nowhere else to warm up.<sup>168</sup> The trial court denied Magadini’s request to instruct the jury on a necessity defense, determining that Magadini had other, legal options.<sup>169</sup> The Supreme Judicial Court vacated most of Magadini’s convictions,

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161. See Fecal Impaction, Cleveland Clinic, <https://my.clevelandclinic.org/health/diseases/23085-fecal-impaction> [<https://perma.cc/5MAS-FFBR>] (last updated May 19, 2022) (“If left untreated, fecal impaction can cause ulcers, colitis, or obstruction to your colon, which can be fatal.”); see also *supra* note 59 and accompanying text (explaining that when people experiencing homelessness lack access to basic sanitation, they risk health complications).

162. The doctrine of public necessity might apply here. See Restatement (Second) of Torts § 196. Public necessity applies when “the actor reasonably believes” that entrance into the land of another is “necessary for the purpose of averting an imminent public disaster.” *Id.* The examples the Restatement offers are, at first glance, quite extreme: “conflagration, flood, earthquake, or pestilence.” *Id.* cmt. a. Yet the comments and Reporter’s Notes to this section describe a sliding scale of “reasonable” responses to various public disasters depending on the circumstances. See *id.* cmts. e–f. For example, buildings may be torn down to prevent the spread of “conflagration,” whereas the spread of smallpox may be mitigated by the burning of infected clothing. See *id.* cmts. a, f–g, Reporter’s Notes. Urinating or defecating in public not only damages property but also carries public health risks. See *supra* note 60 and accompanying text. Thus, entering a private business to use the restroom may very well prevent both property damage and the spread of “pestilence.” The fact that these public health risks are less extreme than those contemplated by the Restatement does not necessarily preclude the application of public necessity because the remedy (entering bathrooms) is commensurately less extreme and is “reasonable” under the circumstances. The cost to private business owners, on the other hand, is slight. See *supra* note 136 and accompanying text (discussing the burden-spreading benefits of bans on customers-only bathrooms).

163. See Restatement (Second) of Torts § 197(1)(a)–(b). The parentheticals here are meant to demonstrate the relevance of necessity doctrine. Of course, the dignitary harms to those facing this dire set of choices are also worth emphasizing. See *supra* section IA.2.

164. 52 N.E.3d 1041 (Mass. 2016).

165. *Id.* at 1044 (“The defendant, David Magadini, was convicted by jury on seven counts of criminal trespass . . .”).

166. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021).

167. *Magadini*, 52 N.E.3d at 1046.

168. *Id.* at 1049.

169. *Id.* at 1045.

remanding for a new trial with an opportunity for a necessity defense.<sup>170</sup> The court determined that Magadini had satisfied the “foundational conditions” for offering a necessity defense by providing “some evidence on each of the four underlying conditions of the defense.”<sup>171</sup> Those elements are:

(1) a clear and imminent danger, not one which is debatable or speculative; (2) [a reasonable expectation that one’s action] will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.<sup>172</sup>

Importantly, the court declined to vacate one of the charges.<sup>173</sup> Magadini entered a creamery on a temperate June day—not to warm up but to use the bathroom for “ten to fifteen minutes.”<sup>174</sup> Regarding this trespass, the court determined that “the defendant did not meet his burden to show a ‘clear and imminent danger’” and thus failed to “demonstrate the foundational requirements for a necessity defense instruction.”<sup>175</sup> The court did not, however, completely foreclose the possibility of a necessity defense under similar circumstances. The court reached its decision for two reasons. First, “the defendant did not request a necessity defense instruction on this charge.”<sup>176</sup> One might think this was reason enough to put the issue to rest. But the court offered another reason: “Trial counsel asked the clerk present at the time the defendant entered the store whether the defendant said that his entry was ‘an emergency and that he really needed . . . to use the bathroom’; she responded, ‘No, . . . he didn’t say anything to me.’”<sup>177</sup> That the court stressed this piece of testimony suggests that it might have considered a necessity defense under slightly different circumstances. A clearer showing of urgent need might have swayed the court.

Lawmakers should take note of the court’s reasoning when drafting laws banning customers-only bathrooms. They might consider following Chicago Alderman Moore’s lead. Alderman Moore’s proposed law stated that “[a]ny licensee that provides public toilet facilities to its customers must allow individuals who have an *emergency and need* to use the toilet

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170. See *id.* at 1054.

171. *Id.* at 1047, 1049 (quoting *Commonwealth v. Kendall*, 883 N.E.2d 269, 273 (Mass. 2008)).

172. *Id.* at 1047 (alterations in original) (quoting *Kendall*, 883 N.E.2d at 272–73).

173. See *id.* at 1054.

174. *Id.* at 1046.

175. *Id.* at 1045, 1048.

176. *Id.* at 1048 n.11.

177. *Id.*

facilities to do so without having to make a purchase.”<sup>178</sup> This language would help ground the access right in a “background limitation” on the right to exclude—the necessity defense—and it mirrors the language that the Massachusetts Supreme Judicial Court stressed.<sup>179</sup>

As the U.S. Supreme Court made clear in *Tyler v. Hennepin County*, state law alone does not define a property right.<sup>180</sup> But Supreme Court precedent also supports a broad necessity exception to *Cedar Point*. The *Cedar Point* majority was a bit unclear about just how “consistent with longstanding background limitations” a law must be to not amount to a taking.<sup>181</sup> How precise must the match be? Is it enough to simply draw *some* legitimacy from common law access privileges?

The *Cedar Point* Court’s treatment of *NLRB v. Babcock & Wilcox Co.*<sup>182</sup> (and especially Justice Brett Kavanaugh’s concurrence) provides guidance here. In *Babcock*, the Court “held that the [National Labor Relations Act] did not require employers to allow organizers onto their property, at least outside the unusual circumstance where their employees were otherwise ‘beyond the reach of reasonable union efforts to communicate with them.’”<sup>183</sup> In other words, the organizers’ access right was contingent on whether they had a reasonable need for access. Concurring in *Cedar Point*, Justice Kavanaugh expressed his view that “*Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a ‘necessity’ exception similar to that noted by the Court today.”<sup>184</sup> The majority was unclear about whether *Babcock* fell

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178. Proposed Chicago Bathroom Ordinance, *supra* note 69 (emphasis added); see also *supra* notes 69–72 and accompanying text.

179. It’s worth considering, however, how this language would play out in practice. Would those seeking to use a business’s bathroom need to first tell an employee that they were having an “emergency” and “really needed” to go? See *Magadini*, 52 N.E.3d at 1048 n.11. Or might this language lead to ambiguity or even litigation over what constitutes an “emergency”? These outcomes would open up those without bathroom access to further embarrassment and would fail to remedy the dignitary harms discussed in section I.A.2, *supra*. On the other hand, one can imagine a scenario in which the “emergency and need” language merely serves as a legal grounding for the statute while going mostly ignored by business owners. Owners and employees might decide that enforcing the “emergency” element is not worth the time and confrontation; such a law would thus operate as a broad ban on customers-only bathrooms. Still, the dignitary risks of this language provide further support for the solution outlined later in section III.B, *infra*. That is, lawmakers could avoid these problems altogether by paying “just compensation” for the access right they acquire from businesses. See U.S. Const. amend. V.

180. See 143 S. Ct. 1369, 1375 (2023); see also *supra* notes 151–152 and accompanying text.

181. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021).

182. 351 U.S. 105 (1956).

183. *Cedar Point*, 141 S. Ct. at 2077 (quoting *Babcock*, 351 U.S. at 113).

184. *Id.* at 2080 (Kavanaugh, J., concurring).

within the necessity exception.<sup>185</sup> But Justice Kavanaugh’s articulation is perhaps the most straightforward explanation of why the Court seemed to treat *Babcock* as good law despite *Cedar Point*’s broader holding that ongoing access rights are typically per se takings.<sup>186</sup>

Notably, an access right for labor organizers seemingly strays from common-law conceptions of necessity found in, say, the Restatement (Second) of Torts.<sup>187</sup> Entry to organize potential union members is not a situation where life or property is seriously and imminently at risk of harm or destruction. *Babcock* does not contemplate violent storms, earthquakes, pestilences, or conflagrations—the kinds of imminent danger that the Restatement envisions.<sup>188</sup> *Babcock* deals with a statute-created necessity.<sup>189</sup> Perhaps labor organizers indirectly protect workers’ lives, property, and chattels. But one must work hard to stretch the Restatement—with all its stormy, apocalyptic imagery—to cover *Babcock*’s access right. So maybe the *Cedar Point* Court simply meant that an access right must draw *some* legitimacy from common law limitations. Or perhaps the Court was simply retrofitting its holding with exceptions to avoid disturbing too much legislation. This indeterminacy<sup>190</sup> may cause headaches for municipal leaders considering bans on customers-only bathrooms. But they could hedge against this uncertainty by following Alderman Moore’s lead and including need-based language in their bans.

2. *Conditioning Benefits.* — Lawmakers could also condition health and safety benefits on the abolition of customers-only bathroom policies. In *Cedar Point*, the Court limited its holding by emphasizing that “the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking.”<sup>191</sup> The Court was primarily concerned with allowing government health and

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185. See *id.* at 2077 (majority opinion) (distinguishing *Babcock* because it “did not involve a takings claim”).

186. See *id.* (“Whatever specific takings issues may be presented by the highly contingent access right we recognized under the NLRA, California’s access regulation effects a *per se* physical taking under our precedents.”).

187. See *supra* notes 157–159 and accompanying text.

188. See Restatement (Second) of Torts § 196 cmt. a (Am. L. Inst. 1964) (stating that the doctrine of public necessity applies to “impending public disaster[s] such as a conflagration, flood, earthquake, or pestilence”); *id.* § 197 illus. 1 (“While A is canoeing on a navigable river, he is suddenly overtaken by a violent storm.”).

189. See *Nat’l Lab. Rels. Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 109 (1956) (“In each of these cases the Board found that the employer violated § 8(a)(1) of the National Labor Relations Act, 61 Stat. 140, making it an unfair labor practice for an employer to interfere with employees in the exercise of rights guaranteed in § 7 of that Act.”).

190. See Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 *Duke J. Const. L. & Pub. Pol’y* 1, 22 (2022) (“Yet the multiple escape hatches enumerated in *Cedar Point*, with their varying levels of subsequent review, make predictions difficult. Questions abound.”).

191. *Cedar Point*, 141 S. Ct. at 2079.

safety inspectors' access to private businesses.<sup>192</sup> So a government clearly may condition “the grant of a benefit such as a permit, license, or registration” on an access right for inspectors.<sup>193</sup> But may it condition such benefits on an access right for the public? Nothing in the Court’s decision explicitly precludes this strategy. The question would become whether the “condition bears an ‘essential nexus’ and ‘rough proportionality’ to the impact of the proposed use of the property”—a test that the Court drew from *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission*.<sup>194</sup> In essence, the access right (the permit condition) would need to bear an “essential nexus” to the same “legitimate state interest” that a refusal to grant the benefit would further.<sup>195</sup> The government would also need to show a “rough proportionality” between the strictures imposed by the permit condition and the harms that would ensue if the government were to grant the benefit without it.<sup>196</sup>

In *Cedar Point*, the Court made clear that, in the case of health and safety inspections, “both the nexus and rough proportionality requirements . . . should not be difficult to satisfy.”<sup>197</sup> A ban on customers-only bathrooms, however, might not satisfy these conditions so easily. First, as compared with the inspection regimes imagined in *Cedar Point*, the bans would bear a more attenuated nexus to a government interest. Lawmakers could strengthen the nexus by framing their legitimate government interest broadly, calling it “improving public health and safety” or something along those lines. Allowing public access to private bathrooms would improve public health, safety, and well-being.<sup>198</sup> Similarly, when municipal agencies deny permits to private businesses, the denial typically furthers the state interests of health and safety.<sup>199</sup> But this broad framing might not convince courts. More fundamentally, *Dolan* and *Nollan* dealt with proposed development projects that would have had potentially

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192. See *id.* (“Under this framework, government health and safety inspection regimes will generally not constitute takings.”).

193. *Id.*

194. *Id.* (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994)); see also *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 (1987).

195. See *Nollan*, 483 U.S. at 836 (“[A] permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.”).

196. See *id.*; Fennell, *supra* note 190, at 28 (“[T]he government must show that the extent of the concession is at least roughly equivalent to the harms that would otherwise ensue if the government were to simply grant the license.”).

197. *Cedar Point*, 141 S. Ct. at 2079.

198. See *supra* notes 59–60 and accompanying text.

199. See, e.g., Food Service Establishment Permit, N.Y.C. Bus., <https://www.nyc.gov/nycbusiness/description/food-service-establishment-permit> [<https://perma.cc/W25Y-TGMC>] (last visited Sept. 25, 2023) (describing the health-related aspects of the regulatory requirements for obtaining a Food Service Establishment permit from the New York City Department of Health and Mental Hygiene).

harmful effects.<sup>200</sup> The permit conditions (or “exactions”) needed some “essential nexus” to remedying the harmful effects of development.<sup>201</sup> It is difficult to say that establishing and operating bars, restaurants, and shops positively contributes to the bathroom access crisis. This Note has established that customers-only bathrooms are harmful to people experiencing homelessness. But this nexus is perhaps less than “essential.” Many factors contribute to homelessness and a lack of bathroom access, including government policy failures. While private business could play an important role in solving the problem, private business alone did not initiate the problem.

It is also difficult to say how these bans would fare on proportionality. The Court has not been entirely clear about what, exactly, must be measured when determining proportionality. Professors Lee Anne Fennell and Eduardo M. Peñalver point out that in *Dolan* “[t]he Court left ambiguous whether it is the harm eliminated by the exaction that must be proportional to the harm the development causes or whether it is the burden of the exaction (to the landowner) that must be proportional to those harms.”<sup>202</sup> The burden-spreading benefits of an across-the-board ban on customers-only bathrooms mean the burden to landowners would be fairly small. And such a ban would offer significant benefits to the public. Again, however, private business hasn’t initiated the harms associated with a lack of bathroom access, so perhaps there is nothing against which to measure the benefits of this access right.

*Cedar Point* offered the nexus-and-proportionality test as a “lifeline thrown out to governments in the *per se* realm.”<sup>203</sup> But, as Professor Fennell writes, “it may turn out to be a false door or even a trap for the government.”<sup>204</sup> This option may prove to be more of an indeterminate headache than the “background limitations” discussed above. Why? First, “exactions scrutiny is so much more exacting than the analysis that generally applies to government actions.”<sup>205</sup> Second, the burden falls on the government to

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200. See Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 Sup. Ct. Rev. 287, 292–93 (2014) (describing the development projects in *Nollan* and *Dolan*); see also *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994) (describing the petitioner’s hardware-store development project); *Nollan*, 483 U.S. at 827 (describing the Nollans’ home-rebuild project).

201. See Fennell, *supra* note 190, at 10 (describing the exaction in question as “something that lacked an ‘essential nexus’ to the impacts that animated the initial restriction on rebuilding” (citing *Nollan*, 483 U.S. at 837)).

202. Fennell & Peñalver, *supra* note 200, at 293 n.28.

203. Fennell, *supra* note 190, at 27.

204. *Id.* at 26.

205. *Id.* That said, in *Cedar Point*, the Court “flip[ped] the script by making every minor grant of access a *per se* taking (unless some exception applies).” *Id.* So, much like the Court’s treatment of “background limitations,” it is unclear how closely this “escape route” from the *per se* takings analysis must match the traditional test (in this case, nexus and

affirmatively establish nexus and proportionality.<sup>206</sup> Third, the *Cedar Point* majority cited *Horne v. Department of Agriculture* for the proposition that “‘basic and familiar uses of property’ are not a special benefit that ‘the Government may hold hostage.’”<sup>207</sup> One might think that the operation of businesses of public accommodation is a “basic and familiar usage” and that conditioning a permit on the provision of an access right would improperly “hold hostage” such a use. But how is a bathroom-access regime different from the health and safety inspection regimes offered by the Court as clear-cut examples of a proper exaction? Are the “permit[s], license[s], or registration[s]” to which the *Cedar Point* majority alludes not a similar hostage situation? Much like the “background limitations” exception, the Court seems to have retrofitted an exception into its holding to avoid disturbing important government actions—in this case, health and safety inspection regimes.<sup>208</sup> The uncertainty of this path suggests that lawmakers would be better off situating their laws within one of the other *Cedar Point* exceptions.

3. *Open to the Public.* — Finally, lawmakers could stress that bans on customers-only restrooms would apply only to businesses “generally open to the public,” situating these bans closer to *PruneYard*<sup>209</sup> than to *Cedar Point*.<sup>210</sup> Businesses of public accommodation clearly open their doors to the public, thus limiting their right to exclude. For example, a café opening itself up to the public cannot choose to exclude members of certain races.<sup>211</sup> But the bathrooms *themselves* are clearly not open to the public when a business limits them to customers only. Would bans on customers-only bathrooms limit a property owner’s right to control access or simply their right to control usage (already having ceded access to the public)? Proponents of these bans could point out that in many cases, only those presenting as homeless are excluded from using the bathroom, whereas

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proportionality). See *id.* (“Although the majority made [the exactions exception] sound like a simple escape route, it may turn out to be a false door . . .”).

206. *Id.* at 29.

207. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021) (quoting *Horne v. Dep’t of Ag.*, 135 S. Ct. 2419, 2430 (2015)); see also Fennell, *supra* note 190, at 30 (“[*Cedar Point*] suggests we would never even *reach* exactions analysis, because there could be no (real) benefit in the picture that might validate what would otherwise be a *per se* taking.”).

208. See Fennell, *supra* note 190, at 31 (“We know this much: the Court wants a test that health and safety inspections will easily clear and that union access requirements cannot pass under any circumstances.”).

209. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

210. *Cedar Point*, 141 S. Ct. at 2076–77.

211. See Fennell, *supra* note 190, at 17 (“Civil rights laws are premised on the idea that regulated actors who make certain kinds of opportunities available cannot make them selectively unavailable based on protected characteristics like race, religion, or gender identity.”).

middle-class-presenting noncustomers can waltz into the bathroom without causing concern.<sup>212</sup> In distinguishing its holding from *PruneYard*, the *Cedar Point* Court cited to *Heart of Atlanta Motel, Inc. v. United States*, which rejected a “claim that provisions of the Civil Rights Act of 1964 prohibiting racial discrimination in public accommodations effected a taking.”<sup>213</sup> Customers-only bathrooms tend to involve not a blanket exclusion but rather a discriminatory one.

Lawmakers could thus make two related arguments in favor of their bans. First, by opening their businesses to the public, landowners subject themselves to usage regulations, and banning customers-only bathrooms is nothing more than a requirement that businesses allow the public to use the bathroom. Under this argument, lawmakers should frame the bathroom as one part of an integrated property unit—a unit whose doors have been opened.<sup>214</sup> Second, lawmakers could argue that the bans are comparable to the Civil Rights Act of 1964. By allowing some noncustomers but not others to use their bathrooms, businesses invite antidiscrimination regulation. Bans on customers-only bathrooms would thus be framed as remedies for ongoing patterns of discrimination. If the bans are successfully situated within *PruneYard*'s holding, the laws would then need

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212. See *supra* notes 38–41 and accompanying text.

213. *Cedar Point*, 141 S. Ct. at 2076 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)); see also Fennell, *supra* note 190, at 14 (“The Court also included a *cf.* cite to *Heart of Atlanta Motel v. United States* . . .”).

214. The framing of the relevant property unit for takings purposes has long been up for debate. The paradigmatic case for this debate is *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In that case, the Court considered a law requiring coal mining companies to leave some sections of coal unmined to avoid subsidence. See *id.* at 412–13. Justice Oliver Wendell Holmes, Jr., wrote for the majority, arguing that the law went “too far” by “taking” this unmined coal. See *id.* at 415. One factor in Justice Holmes’s analysis was the “diminution in value” of the unmined coal. See *id.* at 419. Justice Louis Brandeis, writing in dissent, agreed that “diminution in value” was a relevant factor but argued that the relevant unit for analysis was “the whole property,” not the unmined coal. See *id.* (Brandeis, J., dissenting). In diminution-of-value cases, courts have referred to this relevant unit as the “denominator.” See, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017) (internal quotation marks omitted) (quoting *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). In determining this denominator, courts look to “the reasonable expectations” of property owners based on “background customs and the whole of our legal tradition.” *Id.* at 1945.

Similar principles could help determine the relevant unit for a *PruneYard* analysis. Business owners likely conceive of their bathrooms as a part of an integrated property unit along with the rest of their business space. See, e.g., *Bee’s Auto, Inc. v. City of Clermont*, 927 F. Supp. 2d 1318, 1320–21 (M.D. Fla. 2013) (describing the “parcel of property at issue” in a takings case as containing “a building that is approximately 1,118 square feet in dimension, including two enclosed bays, an office, *two bathrooms*, and an open canopy structure” (emphasis added)). On the other hand, business owners can reasonably expect, based on longstanding practice, to have some control over who can access their bathroom space. See *supra* section II.B.1.



to pass the relatively unexacting *Penn Central* test,<sup>215</sup> which they could most likely do given the low burden the test places on individual businesses.

This section has laid out three pathways through *Cedar Point*'s per se takings holding. First, lawmakers could rely on the necessity doctrine as a “background limitation” on property rights. Second, they could condition government benefits such as permits and licenses on businesses opening their bathrooms to the public. And third, they could stress that these bans fall within *PruneYard*'s holding and pass the *Penn Central* test. The conditional exactions route might be more confusing and indeterminate than it's worth. The third option is likely the most straightforward route.<sup>216</sup> But the fact that bathrooms are often segmented off as more exclusive zones might render this option insufficient. So, lawmakers would be well advised to use a belt-and-suspenders approach, relying on the necessity doctrine as a backup plan.

Local leaders should be careful to emphasize the benefits of these bans, especially if they decide to forgo compensating business owners for the access right. They should stress that by conscripting a wide class of businesses, the burden of providing bathroom access would be spread widely enough to minimize the cost of upkeep for each individual business. Further, local governments could join the fight by committing to building and operating public (i.e., government-operated) bathrooms. This would further spread the burden by taking advantage of both private and public infrastructure options. It would also help governments avoid the appearance of buck-passing. Additionally, governments could frame private bathroom access as an antidiscrimination issue, arguing that the right to exclude shouldn't justify discriminatory exclusion. And finally, governments should stress that people experiencing homelessness aren't the only ones in need of bathrooms—more and more urban dwellers are clamoring for expanded bathroom access.<sup>217</sup> By framing bans as a solution for all, governments could avoid stirring up discriminatory backlash.

#### B. *Offering Just Compensation*

Even if bans on customers-only bathrooms are not takings, lawmakers may want to consider paying “just compensation”<sup>218</sup> anyway. In doing so, they could avoid the indeterminacy of the post-*Cedar Point* takings landscape, save on potential litigation costs, and soften the political blow

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215. See supra note 118 and accompanying text.

216. See Fennell, supra note 190, at 14 (“Perhaps the simplest way for the government to escape liability for a *per se* physical taking is to establish that the landowner actually invited the intrusion.”).

217. See supra notes 61–63 and accompanying text.

218. U.S. Const. amend. V.

for business owners.<sup>219</sup> This solution would also prioritize the dignity of those living in homelessness because lawmakers could skip statutory language invoking necessity and thus avoid requiring those in need of a bathroom to prove that they “really need” to go.<sup>220</sup> Professor Fennell, after surveying the Court’s takings cases, concludes that paying just compensation “is a simple and well-marked way out of the labyrinth” and will often be “cheaper and less risky than attempting to make the necessary showings.”<sup>221</sup> By way of example, Professor Fennell shows that “just compensation” for the Cedar Point Nursery might be as low as \$4.51 per year.<sup>222</sup>

Cities in the United Kingdom and Germany have found some success incentivizing private businesses to open their bathrooms to the public.<sup>223</sup> The District of Columbia recently followed suit by passing a similar initiative, which is apparently still in the pilot phase of implementation.<sup>224</sup> These initiatives offer a yearly stipend ranging from \$650 to \$2,000 for private businesses to open their bathrooms to the public.<sup>225</sup> The participants place a sign or sticker on their storefronts to indicate that their bathrooms are available for use, and municipalities display signs directing people to participating businesses.<sup>226</sup> These programs avoid political blowback by making participation voluntary. But their voluntary nature comes with downsides. First, they “reinforce the norms around ‘For Customers Only’ policies at businesses that are not part of the program.”<sup>227</sup> These norms include discriminatory enforcement and “the stigmatization of homeless individuals to whom they send the message that one’s financial worth is tied to their humanity.”<sup>228</sup> Second, they might fail to adequately incentivize early adoption. The first volunteers would shoulder a heavier burden than later adopters. And finally, voluntary programs would not meet the

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219. See Fennell, *supra* note 190, at 59 (“[P]recommitting to paying just compensation, perhaps by setting aside resources earmarked for this purpose, might prove a valuable strategic move.”).

220. See *supra* note 179 and accompanying text.

221. Fennell, *supra* note 190, at 54.

222. See *id.* at 56.

223. See Hochbaum, *Bathrooms and Homeless Rights*, *supra* note 14, at 253–54; see also, e.g., Communities and Local Government Committee, *The Provision of Public Toilets, 2007-8*, HC 636, at 23 (UK), <https://publications.parliament.uk/pa/cm200708/cmselect/cmcomloc/636/636.pdf> [<https://perma.cc/8EWW-5RVQ>] (detailing the robust participation of “pubs, restaurants, cafes, community centres, retail stores, Council offices and supermarkets” in the Borough of Richmond’s community toilet scheme).

224. See D.C. Code § 10-1053 (2023); Community Restrooms Incentives Pilot, D.C. Pub. Restrooms, <https://dcpublicrestrooms.org/dc-public-restroom-law/community-restrooms-incentives-pilot/> [<https://perma.cc/RYS8-HQ9A>] (last visited Sept. 25, 2023).

225. Julie Chou, Kevin A. Gurley & Boyeong Hong, *Urb. Design F.*, *The Need for Public Bathrooms* 28 (2020), <https://urbandesignforum.org/wp-content/uploads/The-Need-for-Public-Bathrooms.pdf> [<https://perma.cc/G2RY-GZ77>].

226. See *id.*

227. Hochbaum, *Bathrooms and Homeless Rights*, *supra* note 14, at 258.

228. *Id.*

public's bathroom needs as swiftly or comprehensively as would across-the-board bans on customers-only bathrooms.<sup>229</sup> The slow, multiyear rollout of the D.C. program illustrates this problem.<sup>230</sup>

Lawmakers could combine some of these programs' compensation schemes with an involuntary ban. The European programs can provide a baseline for calculating just compensation, a task that is not always possible.<sup>231</sup> The most common method for calculating just compensation is "to examine recent transactions of other property similar to the property taken, making adjustments for differences in the size, age, location, and the quality of improvements."<sup>232</sup> This provides an approximation of the fair market value of whatever property has been taken.<sup>233</sup> Fair market value is "what a willing buyer would pay a willing seller in an arm's-length transaction."<sup>234</sup> Here, municipalities in the United Kingdom and Germany provide a robust set of examples of similar, recent transactions—"willing buyers" (municipalities) and "willing sellers" (businesses). Recent research shows, for example, that an access right to a single, unisex bathroom in London cost £550 per year (approximately \$670); a similar bathroom in another London borough cost £800 per year (approximately \$970; the amount paid varied by borough, hours of operation, and available facilities).<sup>235</sup>

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229. See *id.* at 258–59 ("This proposal, which essentially bans 'For Customers Only' policies, would be the most comprehensive of the three proposals and would likely immediately solve most of the issues of bathroom availability in metropolitan areas.").

230. See Maydeen Merino, *As DC Lapses on Porta Pottie Contract, Public Restroom Pilot Programs Inch Forward*, *St. Sense Media* (Nov. 3, 2021), <https://www.streetsensemedia.org/article/dc-lapses-porta-pottie-contract-public-restroom-pilot-programs/#Y5-5Ci-B30o> [<https://perma.cc/XTJ4-ZMRC>] ("As for the other part of the public restroom law, the business incentive program, the next step after public comment will be for the Department of Small and Local Business and the Downtown D.C. Business Improvement District to negotiate agreements with businesses . . .").

231. See Thomas W. Merrill, *The Compensation Constraint and the Scope of the Takings Clause*, 96 *Notre Dame L. Rev.* 1421, 1421 (2021). Professor Thomas W. Merrill has hypothesized that "the ability to calculate just compensation, using established valuation techniques, is a necessary condition for finding that the Takings Clause applies." *Id.* So if calculating just compensation for bans on customers-only bathrooms proved impossible, that might indicate that the Takings Clause does not apply anyway. As this section will demonstrate, however, just compensation *can* be calculated.

232. *Id.* at 1422.

233. Here, the "property" being taken is an "access right," which is carved out from the landowner's bundle of property rights. This can be conceptualized as a "partial taking." See *id.* at 1431–32 ("Many, perhaps most, physical takings are partial takings. That is, the condemning authority acquires only a portion of the owner's property and leaves the rest in the owner's hands." (footnote omitted)).

234. *Id.* at 1422.

235. Margit Physant, *Community Toilet Schemes in London 2* (2022), <https://www.ageuk.org.uk/bp-assets/globalassets/london/documents/campaigns/community-toilet-schemes-in-london-report-by-margit-physant.pdf> [<https://perma.cc/ZM9H-KELF>]. Currency conversions were conducted using Pound sterling to United States Dollar, Google Finance, <https://www.google.com/finance/quote/GBP-USD?sa=X&ved=2ahUKEw>

Compensating private business owners for access to their bathrooms is significantly more cost-effective than building and operating public bathrooms. For example, one “no-frills” New York City public bathroom cost around \$3 million to construct; cheaper alternatives run about \$185,000 apiece (before installation costs).<sup>236</sup> And municipalities could limit the hit to their budgets by restricting the class of businesses affected by the bans. For example, New York City could restrict bans on customers-only bathrooms to fast food restaurants and coffee shops—a total of around 2,100 establishments.<sup>237</sup> For the sake of illustration, assume the average establishment within this class has two unisex, single-toilet bathrooms. Fair market value for access rights to one such bathroom is somewhere in the \$670 to \$970 range, drawing from London’s recent transactions. So, the price for access rights to two unisex bathrooms might be around \$1,700. That value multiplied by the 2,100 establishments within the class results in a total yearly expenditure of just under \$3.6 million. For comparison, one public bathroom built in 2019 at the Green Central Knoll Playground in Brooklyn cost about \$3.7 million.<sup>238</sup>

Municipal leaders could offer this compensation in the form of tax breaks, direct payments, or whatever form they find easiest to administer. In return, businesses within the relevant class would be required to display a sign or sticker indicating a usable bathroom within. Laws banning customers-only bathrooms could establish reasonable fines for failing to display this signage, which could be assessed during routine building inspections.<sup>239</sup> Municipalities could establish an online complaint filing system and a private or administrative right of action to prevent businesses

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236. Yoav Gonen, *Modular Portland Loo Toilets Are Finally Coming to New York City*, *The City* (Feb. 27, 2023), <https://www.thecity.nyc/2023/02/27/portland-loo-park-bathrooms/> [https://perma.cc/G7Y6-F2MR] (“The five Portland Loo toilets . . . cost roughly \$185,000 each . . . But the overall budget to buy and install five Portland Loos, in one pilot location in each borough, starting as early as summer 2024, could reach as much as \$5.3 million.”).

237. See Sophia Annabelle Klein, Charles Shaviro & Jonathan Bowles, *Ctr. for an Urb. Future, State of the Chains*, 2022, at 21 (2022), [https://nycfuture.org/pdf/CUF\\_StateoftheChains\\_final\\_2022.pdf](https://nycfuture.org/pdf/CUF_StateoftheChains_final_2022.pdf) [https://perma.cc/99SA-GW62] (providing data on the number of chain retail stores in New York City, showing 1,068 fast-food restaurants and 1,042 coffee shops). Of course, some smaller establishments might not even offer bathrooms to paying customers, thus further shrinking the total number of establishments. (And, some non-chain establishments may provide restroom access.) Even if this is an over- or undercount, the illustration provides a helpful baseline.

238. Chou et al., *supra* note 225, at 14.

239. Municipalities could look to other existing fines to determine what is reasonable. A helpful analogy in New York City, for example, is a \$200 fine for failing to properly maintain or install plumbing. See *What’s Required to Do Business in New York City?: Avoid Violations*, *N.Y.C. Bus.*, <https://nyc-business.nyc.gov/nycbusiness/resources-by-industry/restaurant> [https://perma.cc/2XEM-M324] (last visited Oct. 1, 2023).

from excluding noncustomers.<sup>240</sup> Social services organizations and municipal human services departments could help educate the homeless public about their new access rights. While this still might cause some business owners to grumble, just compensation should provide some buffer against political blowback. Further, it would allow municipalities to avoid *Cedar Point*'s seemingly broad holding.

This option—paying just compensation—also has strong normative force. In *Armstrong v. United States*, Justice Hugo Black wrote for the majority, penning these oft-repeated words: “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>241</sup> So who *should* bear the cost of homelessness? Customers-only bathroom policies deny relief to people experiencing homelessness, and banning them would alleviate suffering. But the problem of bathroom access was not created by café owners.<sup>242</sup> As with the broader homelessness crisis, the cause is complex. We—“the public as a whole”<sup>243</sup>—must confront the ways in which we’ve failed those without a home. We the people who avert our eyes from those sleeping on the sidewalk. We the lawmakers (and the voters who elect them) who have failed to operate enough public bathrooms, who have failed to care for the needs of the desperate. We the residents of big, blue cities who NIMBY our way out of lasting solutions.<sup>244</sup> Let us confront our failure by inviting the destitute into our intimate spaces and daily routines—our collective dining room tables and the places we spend the cash we told the guy on the subway we didn’t have. Rather than wrangling over formal legal categories and passing off responsibility, let us join together to bear the cost.

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240. In *Pilotto v. Urban Outfitters West, L.L.C.*, the Appellate Court of Illinois determined that the state’s Ally’s Law included an implied right of private action because the \$100 fine for violations did not sufficiently dissuade repeated violations. See 72 N.E.3d 772, 786 (Ill. App. Ct. 2017). Lawmakers should follow the Illinois Appellate Court’s reasoning by explicitly including a right of action in ordinances banning customers-only bathrooms. See Weinmeyer, *supra* note 15, at 26–27 (describing the enforcement problems articulated by the *Pilotto* court).

241. 364 U.S. 40, 49 (1960); see also *Tyler v. Hennepin County*, 143 S. Ct. 1369, 1380 (2023) (repeating Justice Black’s language from *Armstrong*); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (same).

242. See *supra* note 35 and accompanying text.

243. *Armstrong*, 364 U.S. at 49.

244. NIMBY stands for “not in my backyard” and refers to “the kind of people who believe in affordable housing until it’s in their neighborhood.” Diana Budds, *Obama Blames Liberal NIMBYs for the Housing Crisis Too*, *Curbed* (June 29, 2022), <https://www.curbed.com/2022/06/obama-aia-conference-housing-crisis-liberal-nimby-yimby.html> [<https://perma.cc/2Z3Y-DVZL>].

## CONCLUSION

Customers-only bathroom policies have adverse, discriminatory effects on people experiencing homelessness. Banning such policies would not end homelessness, but it could significantly alleviate the suffering of society's most vulnerable. Lawmakers could enact such bans by either charting a path through *Cedar Point's* takings doctrine or circumnavigating its holding altogether by paying just compensation. But this Note is more than a study of takings doctrine. Hopefully it serves as a reminder that the law ought to care about less-than-glamorous problems affecting people we'd too often prefer to ignore.