No. 17-431

IN THE
Supreme Court of the United States

RECYCLE FOR CHANGE,
Petitioner,

v.

CITY OF OAKLAND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an ordinance content based when it governs only the time, place, and manner in which unattended donation collection boxes may be operated without regard to the operator's message or purpose?

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INTRODUCTION

The Ninth Circuit's decision is a routine application of established First Amendment principles to a content-neutral regulation. Faced with evidence of blight and public nuisance, the City of Oakland ("City") enacted an ordinance in 2015 ("Ordinance") to regulate unattended donation collection boxes ("UDCBs"). The ordinance does not ban UDCBs nor favor one kind of UDCB operator over another. Instead, the Ordinance sets forth basic requirements for design, geographic location, distance separation, and maintenance, and implements a permit requirement with fees to defray the cost of administering the program. These features are the type of reasonable regulations this Court has deemed content neutral time and again.

Petitioner Recycle for Change ("Recycle") argues that the Ordinance is content based because the Ordinance is addressed to UDCBs instead of regulating all "receptacles"—trash and recycling bins, dumpsters, etc.—in one fell swoop. And it contends that the Ninth Circuit created a split when it rejected Recycle's position in affirming the denial of Recycle's motion for a preliminary injunction. Recycle is wrong at every step: the Ninth Circuit's opinion created no split and it is fully consistent with this Court's First Amendment jurisprudence.

In a carefully reasoned opinion, the Ninth Circuit explained that the Ordinance was content neutral because it "regulates the unattended collection of personal items for distribution, reuse, and recycling, without regard to the charitable or business purpose for doing so," conduct which "is neither expressive nor

communicative." Pet. App. 11a. In so holding, the Ninth Circuit expressly distinguished a Sixth Circuit decision that held that a UDCB regulation was content based precisely because it banned *only* UDCBs operated for charitable purposes. Neither the Sixth Circuit nor any other court has ever addressed—let alone treated as content based—a regulation like the Ordinance, which regulates all UDCBs even-handedly. Indeed, the Sixth Circuit's opinion strongly suggests that it would find an ordinance like the one here to be content neutral.

The Ninth Circuit's decision is also fully consistent with this Court's First Amendment jurisprudence. As the Ninth Circuit explained, the Ordinance falls comfortably within the principles set out in cases like *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), where the Court held that a regulation that required cable operators to carry some, but not all channels, was not content based because it did not distinguish among the channels on the basis of their content. The reality is that Oakland already regulates dumpsters, recycling bins, and other receptacles. Nothing in the First Amendment requires the City to regulate all receptacles in the same ordinance or to ignore the particular problems posed by particular kinds of receptacles.

The rest of Recycle's petition is devoted to factual assertions that only confirm the inappropriateness of this case as a vehicle for the Court to address the regulation of UDCBs. Recycle implies, Pet. at 2, that the City regulated UDCBs in order to favor "brick-and-mortar" charities. Recycle fails to mention that the Ninth Circuit found that argument to be both waived

and unsupported by the record. Pet. App. 13a. Recycle contends, Pet. at 21-22, that UDCBs play an important role in reducing waste—a set of assertions that are undeveloped on the preliminary injunction record, and in any case go to whether the Ordinance survives intermediate scrutiny, a holding that Recycle does not seek review of here. And Recycle asserts that the decision below has caused "analytical confusion," Pet. at 20, but it points to only a single presentation given at a single conference as evidence of that supposed confusion.

The reality is that there is a dearth of case law addressing UDCBs, and the Ninth Circuit took great care to ensure that its decision was consistent with that limited case law and this Court's broader First Amendment precedents. Because the decision below creates no split, is correct, and is a poor vehicle to address the question presented to boot, this Court should deny the petition.

STATEMENT OF THE CASE

A. Oakland's Regulation of Unattended Donation Collection Boxes

UDCBs are unstaffed drop-off boxes that accept clothing, textiles, books, shoes, or other salvageable personal property to be used by the UDCB's operator for distribution, resale, or recycling. SER 7.[1] UDCBs

[1] Citations to "SER" refer to the Supplemental Excerpt of Record filed by the City in the Ninth Circuit on April 21, 2016. Citations to "ER" refer to the Excerpts of Record filed by Petitioner in the Ninth Circuit on March 24, 2016.

are intended for public use and are unmonitored and accessible at any time, 24 hours a day. *Id.* at 9. Since 2008, UDCB operators—both charitable organizations and for-profit companies—have placed UDCBs throughout the City, including at schools, grocery stores, gas stations, in parking lots, and near businesses. *Id.* at 7. UDCBs are large and heavy. They are typically made of steel; seven feet tall, feet wide, and more than four feet deep. *Id.*; ER 5; Pet. App. 53a. In 2015, there were two main UDCB operators in the City: Petitioner Recycle, a non-profit organization, and USAgain, LLC ("USAgain"), a for-profit limited liability company engaged in the business of textile recycling. Pet. App. 7a.

UDCBs are a relatively new phenomenon, and starting in 2012, the City began to consider the impact of UDCBs on the community. SER 22-23, 30; Pet. App. 20a-21a. Through these efforts, the City learned that UDCBs were attracting illegal dumping, scavenging, and graffiti. SER 8-9. Between 2014 and 2015, the City conducted exhaustive analyses and produced numerous proposals and subsequent revisions before finalizing the UDCB ordinance. *Id.* at 9-11; ER 18.

The City began by evaluating its existing regulations relating to other box/container-type facilities and receptacles to determine whether they were sufficient to regulate UDCBs. SER 9. The City already regulated Satellite Recycling Collection Centers—large recycling facilities for beverage containers commonly found in supermarket parking lots, which require permits and are generally subject to a more stringent set of

conditions and discretionary approvals than UDCBs. *Id.* at 15.

The City also assessed its existing regulations for trash and recycling receptacles for private use, and regulations pertaining to construction and demolition debris containers, which are used for construction projects and require permits, application fees, and conditioned approval. SER 16. The City concluded that these existing regulations were either inappropriate or insufficient to cover UDCBs. *Id.* at 9.

The City also conducted additional analyses, including the following:

- *Fee analysis.* The City conducted a fee analysis study to determine an appropriate basis for fees so that the fee would not exceed the reasonable cost of providing the service (*i.e.*, processing the application). In doing so, the staff also compared the fees for UDCBs in other jurisdictions and determined that the City's proposed fees were reasonable and comparable. SER 10.

- *Comparing separation requirements.* The City studied existing regulations, including separation requirements for UDCBs in other jurisdictions to determine what the appropriate distance should be between UDCBs. Ultimately, the City determined that 1,000 feet was an appropriate distance. SER 10. The City also noted that its planning code already contained various "separation requirements" for activities ranging from alcoholic beverage sales, fast food sales, laundromats, and check cashing; activities that

tend to attract similar nuisance-related issues. *Id.* at 28-29.

- *Zoning study.* The City studied which zones would be appropriate for UDCBs to minimize blight and other secondary impacts on residents while supporting the City's zero-waste initiatives to provide a way for residents to recycle goods rather than place them in the waste stream. SER 10-11, 30. After considering many options, the City ultimately recommended allowing UDCBs in most commercial and all industrial zones. *Id.* at 10-11.

- *Public comment.* The City also invited stakeholders to review and comment on proposed drafts of the UDCB ordinance. Both Recycle and USAgain provided comments. SER 11.

Ultimately, the City, like many local governments, determined that UDCBs require specific regulations due to their unique set of secondary impacts, which adversely affect the public health, safety, and welfare. SER 9. For example, because UDCBs are publically accessible throughout the day and night, but unmonitored, they can become public nuisances by attracting illegal dumping, scavenging, and graffiti. Pet. App. 14a-16a; SER 9, 31-33. Likewise, staff determined that the placement of UDCBs in parking spaces and elsewhere impacts vehicle and pedestrian safety. Pet. App. 14a; SER 9, 15. City staff concluded that regulating UDCBs would prevent blight, thereby raising property values. SER 23. At the same time, the City also considered benefits to the community that came with UDCBs; Committee members were informed that

UDCBs "support zero-waste policies" and the City ultimately rejected an outright ban on UDCBs because it "may result in an increase in the waste stream." *Id.* at 20, 30.

In October 2015, the City enacted the Ordinance, No. 13335 C.M.S. The Ordinance states that its purpose is to "promote the health, safety, and/or welfare of the public by providing minimum blight-related performance standards for the operation" of UDCBs. Pet. App. 14a (citing Oakland Mun. Code § 5.19.010). To accomplish that goal, the Ordinance sets forth basic requirements for design, geographical location, distance separation, and maintenance of UDCBs, and implements a permit requirement with fees to offset the costs of the program. *Id.* at 3a.

The Ordinance regulates all UDCBs. *See* Pet. App. 2a-3a (quoting Oak. Mun. Code § 5.19.060(A)); *Id.* at 6a. With exceptions not relevant to this case, the Ordinance regulates all UDCBs in the same manner, regardless of whether the owner is a non-profit or a for-profit entity. *Id.* at 2a; SER 11. Likewise, the Ordinance does not distinguish between the causes supported or the particular message promoted by the UDCB operator. Pet. App. 6a-7a; SER 11.

As of 2014, 152 UDCBs existed in the City. SER 7. The City estimated that the Ordinance—with its separation requirements and geographical limitations – could accommodate 137 UDCBs, thus preserving at least 90% of the total UDCBs that existed prior to the enforcement of the Ordinance (a net loss of only 15 boxes), albeit in different locations. *Id.*

B. Preliminary Injunction Proceedings in the District Court

Recycle brought suit challenging the Ordinance, contending, as relevant here, that the Ordinance violates Recycle's First Amendment right to solicit charitable donations, thereby violating its right to free speech. Pet. App. 2a; *id.* at 19a, 24a. Recycle sought a preliminary injunction. *Id.* at 23a.

The district court denied Recycle's motion. Pet. App. 19a-37a. In arguing that the Ordinance was a content-based restriction and should therefore be subject to strict scrutiny, Recycle relied on the Sixth Circuit's decision in *Planet Aid v. City of St. Johns*, 782 F.3d 318 (6th Cir. 2015), in which the court found that a ban on UDCBs was not content neutral and thus subject to strict scrutiny. Pet. App. 25a.

The district court explained why the City's Ordinance was materially different from the ordinance in *Planet Aid*. "To begin with," the court observed, the Oakland "[o]rdinance does not totally ban UDCBs. Instead, it regulates the placement, maintenance, and physical characteristics of UDCBs irrespective of their message or affiliated organization." Pet. App. 26a. The district court further found that the City intended the Ordinance to regulate UDCBs in a content-neutral way. *Id.* at 27a.

The district court thus found that intermediate scrutiny applied, and observed that Recycle did not argue that the Ordinance fails to meet that standard. Pet. App. 29a-30a. Finally, the district court addressed Recycle's arguments that the Ordinance's permit

application fees were too high. *Id.* at 30a. The fees, the court found, did not exceed the cost of processing the application and were within the range of what other cities charged for these services. *Id.* at 30a-31a. Ultimately, the district court held that it was not likely that Recycle would prevail on the merits of its First Amendment challenge for these reasons, and it further found that Recycle had not shown it would not suffer irreparable harm from the enforcement of the Ordinance. *Id.* at 31a, 35a-37a. The district court accordingly denied Recycle's motion for preliminary relief. *Id.* at 37a.

C. Proceedings in the Ninth Circuit

The Ninth Circuit unanimously affirmed the district court's denial of the preliminary injunction. Pet. App. 1a-2a. To begin, the court of appeals assumed without deciding that UDCBs have some expressive aspects, thus triggering the First Amendment. *Id.* at 4a. The court then accepted the proposition that charitable solicitations are protected speech, and moved to the critical question whether the Ordinance is content neutral or content based. *Id.* at 4a-5a.

The Ninth Circuit concluded that the Ordinance is content neutral. Pet. App. 6a-9a. The court found that the Ordinance is not limited to UDCBs soliciting charitable donations and instead applies "to any unattended structure that accepts personal items 'for distribution, resale, or recycling.'" *Id.* at 6a (quoting Oak. Mun. Code § 5.19.050). As the court of appeals explained, it "does not matter *why* the UDCB operator is collecting the personal items." *Id.* at 6a-7a. The Ninth Circuit found that the preliminary injunction record

established that some UDCB operators exist for charitable purposes, but that for-profit companies are also common in the industry. *Id.* at 7a. The court noted that USAgain, one of the largest UDCB operators in Oakland, is a for-profit company. *Id.*

In concluding that the Ordinance is content neutral, the court of appeals discussed at length the Sixth Circuit's decision in *Planet Aid*, which it found "instructive," but different from the case at bar. Pet. App. 8a. In *Planet Aid*, the Ninth Circuit explained, the Sixth Circuit held the ordinance that banned "UDCBs collecting charitable donations was content based not because it required enforcing officers to look just at the message a UDCB itself was expressing, but because it required officers to *look for a specific message soliciting charitable donations*." *Id.* (emphasis added). Because the ordinance in that case "targeted only those bins engaging in a specific kind of protected expression, it was content based." *Id.* at 9a. In contrast, the Ninth Circuit held, "here the Ordinance does not discriminate on the basis of any message," but rather regulates UDCBs "without regard to the charitable or business purpose" of their existence. *Id.* at 11a.

The Ninth Circuit further observed that this Court's opinion in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), provided helpful guidance. Pet. App. 10a. The ordinance in *Reed* distinguished between "temporary directional signs," "political signs," and "ideological signs." 135 S. Ct. at 2227. And this Court explained that the ordinance was content based because "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." Pet. App. 10a

(quoting *Reed*, 135 S. Ct. at 2227). Unlike the *Reed* ordinance, "the Ordinance [here] is indifferent with regard to the nature [of the box's purpose], the inducements provided for donations, or the uses to which the donations will be put." *Id.* at 12a.

The Ninth Circuit held that the Ordinance was instead similar to the content-neutral law in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). The law in *Turner Broadcasting* "required 'cable operators to carry the signals of a specified number of local broadcast television stations.'" Pet. App. 11a (quoting *Turner Broadcasting*, 512 U.S. at 630). This Court held the provision in *Turner Broadcasting* was content neutral because it was agnostic as to the "views, programs, or stations the cable operator has selected or will select." *Id.* (quoting *Turner Broadcasting*, 512 U.S. at 644). The Ninth Circuit explained "[t]he same is true here." *Id.* "[T]he purpose of, or message expressed by, [Recycle's] UDCBs is irrelevant to whether they are subject to the Ordinance's requirements." *Id.* at 11a-12a.

The Ninth Circuit acknowledged that the Ordinance imposed additional costs on Recycle and that "the zoning limitations would burden to a degree [Recycle's] ability to express its" charitable message. Pet. App. at 12a. But it found that the fact that the Ordinance burdens UDCBs at all does not mean that the Ordinance is content based; "to prove that the Ordinance is a content-based regulation," Recycle "would have to show that the law applies to its UDCBs *because* the bins engage in charitable solicitation." *Id.*

Next, the Ninth Circuit turned to whether the City passed the Ordinance with an intent to burden protected

speech because it disagreed with UDCBs' message. Pet. App. 13a. At oral argument, Recycle asserted that the purpose of the Ordinance was to support brick-and-mortar charities at the expense of charities like Recycle who solicit donations through UDCBs. The Ninth Circuit held that Recycle had waived this argument but that even if the argument were not waived, "we would reject it." *Id.* "That Oakland intended to benefit charity organizations that operate in brick-and-mortar stores is not discrimination on the basis of [Recycle's] message. Rather, it discriminates based on *how* [Recycle] solicits charitable donations." *Id.*

Moreover, the court observed, the record demonstrated that Oakland did not pass the Ordinance with an intent to burden the UDCBs' message. Pet. App. 14a. The Ordinance was justified by "other considerations," including "that UDCBs attract illegal dumping, scavenging, and graffiti, and had been placed in a manner that tended to harm the safety of drivers and pedestrians." *Id.*

Having concluded the Ordinance was content neutral, the Ninth Circuit determined that it survived intermediate scrutiny. Pet. App. 15a. The Ordinance advanced the City's interests in combatting blight, illegal dumping, graffiti, and dangerous traffic impediments. *Id.* And the Ordinance was narrowly tailored—its restriction on UDCBs within 1,000 feet of one another addressed the "clustering" of UDCBs, which can create an appearance of an informal dumping area, attracting unintended items such as couches and electronics. *Id.* at 16a. Nor was the Ordinance

overbroad, since reasonable opportunities to establish UDCBs still existed. *Id.* at 17a.

Ultimately, the Ninth Circuit affirmed the district court's denial of Recycle's motion for a preliminary injunction because Recycle was not likely to succeed on the merits of its First Amendment claim. Pet. App. 18a.

Proceedings in the district court are currently stayed by agreement of the parties pending resolution of any proceedings in this Court. *See Recycle for Change v. City of Oakland*, 3:15-cv-05093-WHO (N.D. Cal.), Dkt. 57.

REASONS FOR DENYING THE PETITION

Recycle asks this Court to review whether the Ninth Circuit correctly found the Ordinance to be content neutral.[2] There is no circuit split on that question because the City's Ordinance is materially distinguishable from the regulations at issue in the few other cases addressing regulations of UDCBs. Moreover, the Ninth Circuit's decision below is entirely consistent with this Court's First Amendment jurisprudence addressing the boundary between content-neutral and content-based regulations. And even if a circuit split existed on this question (and it does not) this case would not present a good vehicle for resolving these issues, and this Court's review would benefit from further percolation given the dearth of

[2] Recycle does not seek review of other aspects of the Ninth Circuit's decision, including the Ninth Circuit's conclusion that the Ordinance survives intermediate scrutiny. Pet. App. 15a-18a.

appellate authority on UDCBs and the limited preliminary injunction record in this case.

I. There Is No Circuit Split On The Question Presented

There is no conflict of authority between the courts of appeal for this Court to review. Recycle claims that a conflict exists between the Ninth Circuit's decision in this case and the Sixth Circuit's opinion in *Planet Aid v. City of St. Johns*, 782 F.3d 318 (6th Cir. 2015). But the Ninth Circuit expressly and correctly distinguished *Planet Aid*. Pet. App. 8a-9a. The ordinance in *Planet Aid*, unlike the City's Ordinance, banned a subset of UDCBs outright and did so on the basis of the expressive message of the UDCB operator. 782 F.3d at 320. Specifically, the Planet Aid ordinance "ban[ned] only those unattended, outdoor receptacles with an expressive message on a particular topic—charitable solicitation and giving." *Id.* at 328. Because the First Amendment protects speech soliciting charitable donations, the Sixth Circuit held that the ordinance banning only UDCBs accepting charitable donations was content based. *Id.*

As the Ninth Circuit observed, "[i]n *Planet Aid*, the bins' message of charitable giving was viewed as 'content' because it is a particular kind of protected speech." Pet. App. 9a. By contrast, the Ordinance regulates Oakland's UDCBs even-handedly, without regard to whether operator is engaged in a for-profit business or a charitable enterprise: "[T]he Ordinance regulates the unattended collection of personal items for distribution, reuse, and recycling, without regard to the charitable or business purpose for doing so," conduct

which "is neither expressive nor communicative." *Id.* at 11a. Indeed, the City's Ordinance is just the type of regulation that the Sixth Circuit in *Planet Aid* suggested would be constitutional—one that merely regulates receptacles' "height, size, cleanliness, [and] where they may be located," rather than "ban[ning] altogether an entire subclass of physical, outdoor objects—those with an expressive message protected by the First Amendment." *Planet Aid*, 782 F.3d at 329-30.

Recycle also claims that a conflict exists between the Ninth Circuit and the Fifth Circuit's decision in *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202 (5th Cir. 2011). Recycle did not even cite *Abbott* until its reply brief in the Ninth Circuit, and for good reason: It, too, is distinguishable. Unlike the Ordinance here, the regulation in *Abbott* did not address the appearance, placement, fees, or approval of the UDCBs themselves. Instead, the challenged regulation in *Abbott* was a provision requiring professional fundraisers that solicit donations on behalf of charities through UDCBs to disclose the amount the charity pays to the fundraiser. *Id.* at 206-07, 211. Because that regulation compelled the disclosure of fee arrangements based on the charitable purpose of the UDCB, the Fifth Circuit held that the appropriate standard was the strict scrutiny found in this Court's line of cases regarding regulations targeted at charitable solicitations: *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Village of Schaumburg v. Citizens for a*

Better Environment, 444 U.S. 620 (1980). *Abbott*, 647 F.3d at 212-13.

That holding has no relevance here. The City's Ordinance does not single out charitable UDCBs in any way, let alone require disclosure of the amount that professional fundraisers are paid by charities for their services concerning UDCBs. The Ninth Circuit thus did not create a circuit split with *Abbott* by concluding that the City's even-handed, non-charitable-speech compelling ordinance, was content neutral.

Finally, the district court opinion that Recycle cites is similarly distinguishable. *Linc-Drop, Inc. v. City of Lincoln*, 996 F. Supp. 2d 845 (D. Neb. 2014), involved a municipal ordinance restricting UDCBs to certain non-profit organizations and "require[ing] that at least 80 percent of the proceeds from the boxes be used for charitable purposes." *Id.* at 847. The district court analyzed this Court's precedent in *Riley*, *Munson*, and *Schaumburg*, and summarized those cases as "invalidat[ing] laws that prohibited charitable organizations or fundraisers from engaging in charitable solicitation if they spent high percentages of donated funds on fundraising." *Id.* at 852 (quoting *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 619 (2003)).

Based on this synopsis, it is evident why that line of cases (and strict scrutiny) applied to the regulation at issue in *Linc-Drop*, but does not apply to the Ordinance at issue here: the former banned certain groups from making charitable solicitations; the latter only provides content-neutral regulation on the time, place, and manner of a certain method of solicitation. Thus, the

district court's holding in *Linc-Drop* that Lincoln's "80-percent requirement cannot survive comparison to *Schaumburg*, *Munson*, and *Riley*" has no bearing on this case, and certainly does not constitute a split among the courts. *Id.* at 854.

In short, the Ninth Circuit's opinion in this case is a careful decision that expressly distinguishes other authority. It did not create a circuit split.

II. The Ninth Circuit's Decision Is Consistent With This Court's First Amendment Teachings

Certiorari is also not warranted because the Ninth Circuit's decision is entirely consistent with this Court's First Amendment jurisprudence. A regulation is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. When a facially-neutral restriction is not based on "disagreement with the message" and is "justified without reference to the content of the regulated speech," intermediate scrutiny applies. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Citing this Court's precedent, the Ninth Circuit held that "the Ordinance is content neutral because it does not, on its face, discriminate on the basis of content; can be justified without reference to the content of the regulated speech; and there is no evidence that Oakland adopted the Ordinance because it disagreed with the message conveyed by the UDCBs." Pet. App. 6a.

The Ninth Circuit explained in depth why the Ordinance was content neutral under this Court's decisions in *Reed* and *Turner Broadcasting*. The Sign

Code in *Reed* distinguished between "temporary directional signs," "political signs," and "ideological signs." Pet. App. 10a (quoting *Reed*, 135 S. Ct. at 2227). This Court held that the regulation was content based because "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." *Reed*, 135 S. Ct. at 2227. Specifically, "the Church's signs inviting people to attend worship services are treated differently from signs conveying other types of ideas." Pet. App. 10a (quoting *Reed*, 135 S. Ct. at 2227). The Ninth Circuit distinguished the Ordinance from the Sign Code in *Reed* because "the Ordinance does not discriminate on the basis of any message—whether by targeting speech written on the boxes or by targeting the substantive content of the boxes' inherent expressive component." Pet. App. 11a.

The Ninth Circuit found the regulation more akin to the one this Court addressed in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). Pet. App. 11a. In that case, the Court held that the "must-carry" provisions that required cable operators to carry the signals of a set number of local broadcast television stations was content neutral because the law "did not 'impose[] a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select.'" *Id.* (quoting *Turner Broadcasting*, 512 U.S. at 644-45).

Here, the Ninth Circuit observed, "the purpose of, or message expressed by, [Recycle's] UDCBs is irrelevant to whether they are subject to the Ordinance's requirements." Pet. App. 11a-12a; *see also id.* (quoting

Ward, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.")). In short, the Ordinance regulates all UDCBs regardless of what they "say." *See id.* at 12a ("Although the function of the boxes requires that they contain a message explaining their function, the Ordinance is indifferent with regard to the nature of that explanation, the inducements provided for donations, or the uses to which the donation will be put.").

As a result, this case is unlike this Court's precedent on which Recycle relies in its petition. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), for example, the regulation in question banned newsracks that distributed "commercial handbills" but not "newspapers." *Id.* at 429. And in *Schaumburg*, 444 U.S. 620, the ordinance prohibited outright the solicitation of contributions by only *some* charitable organizations. *Id.* at 636 (ordinance "prohibit[ed] solicitation by charities that spend more than one-quarter of their receipts on fundraising, salaries, and overhead"). Unlike the regulations in *Discovery Networks* and *Schaumburg*, the Ordinance here does not meaningfully distinguish nor treat differently any UDCB operators, and does not ban anything outright.

Instead, the Ordinance sets forth basic requirements for design, geographic location, distance separation, and maintenance, and implements a permit requirement with fees to defray the cost of administering the program. These features are the type of reasonable regulations this Court has deemed content neutral time

and again. *See Reed*, 135 S. Ct. at 2232 (observing "Town has ample content-neutral options to resolve problems with safety and aesthetics," including sign regulation relating to "size, building materials, lighting, moving parts, and portability"); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (ordinance prohibiting the posting of signs on public property "is neutral—indeed it is silent—concerning any speaker's point of view"); *Turner Broadcasting*, 512 U.S. at 632 (law "subject[s] all but the smallest cable systems nationwide to must-carry obligations"); *Ward v. Rock Against Racism*, 491 U.S. 781, 787 (1989) (regulation provided that "the city [would] furnish high quality sound equipment and retain an independent, experienced sound technician for all performances at the bandshell"); *Discovery Network*, 507 U.S. at 417 (noting that Cincinnati could have addressed its concerns regarding visual blight caused by littering caused by newsracks "by regulating their size, shape, appearance, or number").

Recycle's contention that the Ordinance is content based because it does not regulate all receptacles is particularly misplaced given that those other containers are *already* subject to regulation, which the City concluded were not appropriate for the regulation of UDCBs. *See supra*, at 4-5. Nothing in the First Amendment requires a city to regulate all receptacles in a single blunderbuss piece of legislation or to ignore the particular problems posed by different kinds of receptacles. On the contrary, the First Amendment leaves government bodies with ample room to take incremental regulatory steps, imposing "no freestanding

'underinclusiveness limitation.'" *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015). In other words, a municipality "need not address all aspects of a problem in one fell swoop." *Id.* Consistent with this rule, the Court has "upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id.* (citing cases).

Of particular relevance here, the Court has upheld against First Amendment challenges regulations that provided only a partial solution to the government's aesthetic interests. *See, e.g.*, *Vincent*, 466 U.S. at 811 ("[T]he aesthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property .... Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511-12 (1981) (plurality op.) (regulation banned offsite advertising but not on-site advertising; "whether onsite advertising is permitted or not, the prohibition on offsite advertising is directly related to the stated objectives of traffic safety and aesthetics"). Indeed, if Recycle were correct that the Ordinance is content based because it regulates UDCBs but not other rectangular bins, government entities would be required to pass broad, generally-applicable regulations to ensure those regulations are content neutral. But such poorly-tailored regulations would no doubt fail to meet intermediate scrutiny's tailoring requirement. Nor would such regulations be wise as a matter of policy. The Constitution does not require such a result.

Finally, the Ninth Circuit's decision is consistent with this Court's precedent holding that inspection of the speaker's message is insufficient to render a regulation content based. For example, as the Ninth Circuit observed, this Court in *Hill v. Colorado*, 530 U.S. 703 (2000), rejected the argument that the abortion-protesting law in question was content based "[b]ecause the content of oral statements made by an approaching speaker must sometimes be examined to determine whether the approach is covered by the statute." *Id.* at 720.[3] The Court stated that it has "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at 721. Ultimately, the Court held that the regulation in *Hill* was content neutral because "it is not a 'regulation of speech'" per se, but "a regulation of the places where some speech may occur." *Id.* at 719. The same is true here.

In short, the Ninth Circuit's decision did not create any new rules and is entirely consistent with this Court's precedent.

III. This Case Is Not An Appropriate Vehicle For The Question Presented

Even if there were a split (and there is not), this case would not be an appropriate vehicle for addressing the

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[3] The Ninth Circuit cited and quoted *Hill*, Pet. App. 7a, and did not, as Recycle suggests, rely only on "its own reversed decision in *Reed v. Town of Gilbert*." Pet. at 17.

First Amendment's application to the regulation of UDCBs.

First, it would be premature for this Court to review UDCB regulation now. Recycle observes that "[m]unicipalities, counties, and states in *every* federal judicial circuit have passed laws restricting donation bins," Pet. 18 (emphasis in original), but the paucity of cases addressing them suggests that such laws have been uncontroversial. If UDCB regulation ultimately leads to differing legal conclusions in differing jurisdictions, this Court can consider whether certiorari would be warranted at that time.

It is for that reason that Recycle's claim that the decision below has created "analytical confusion," Pet. 20, is overblown to say the least. Recycle's evidence of "confusion" is a single presentation at a single conference. And that lone source does not say anything about confusion, but rather asserts correctly that this is a "[r]elatively new arena of regulation." Bart W. Brizee & Deborah J. Fox, *Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct, or Communications?*, 5 League of California Cities 2017 Annual Conference & Expo (Sept. 15, 2017).[4]

Second, this case does not present the Court with an opportunity to address the issues that were dispositive in the limited body of case law that does exist concerning UDCBs. The City's Ordinance does not *ban* UDCBs, as did the regulation in *Planet Aid*, it does not *compel* disclosure of the payments made by a charitable

[4] Available at http://bit.ly/2lSlbIm (accessed Nov. 5, 2017).

organization, as did the regulation in *Abbott*, it does not *prohibit* certain groups from using UDCBs, as did the ordinance in *Linc-Drop*, and it does not *distinguish* between donations put to charitable and non-charitable uses, as did the regulations in all three cases. The present case does not provide the Court with an appropriate vehicle to address whatever constitutional concerns might be posed by those regulatory features.

Third, and finally, this case is a poor vehicle for review because it arises in the context of a preliminary injunction. Recycle devotes several pages of its Petition to contending that UDCBs play an important role in reducing pollution. Pet. at 20-23. At the outset, to the extent that argument has any legal relevance, it would go to whether the Ordinance is narrowly tailored, a conclusion that Recycle does not ask this Court to review. But regardless, almost none of the material that Recycle cites is part of the preliminary injunction record.

Likewise, Recycle and its amicus suggest that the fees imposed by the Ordinance are unwarranted. Again that conclusion goes to the (unchallenged) issue of whether the Ordinance is narrowly tailored. And in any case, the preliminary injunction record did not suggest that the fees were designed to do anything other than defray administrative costs. Pet. App. 17a.

Nor is the record fully developed on the ways in which the City *already* regulates receptacles such as recycling collection centers, trash and recycling bins, and construction and demolition debris containers. Recycle's principal argument on the merits is that the City has to regulate all receptacles in one fell swoop,

notwithstanding the differences within the umbrella category of receptacles and notwithstanding the fact that the City *already* regulates these objects. *See supra* at 4-5. At any rate, the interlocutory nature of the petition means that this Court can always review the question after a full trial on the merits, and presumably after further development of the law in other courts.

In short, this case presents a poor vehicle for review, if a circuit conflict even existed. But it does not, and the Ninth Circuit's opinion is entirely consistent with this Court's First Amendment jurisprudence.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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