No. _______

In the Supreme Court of the United States

RECYCLE FOR CHANGE,

Petitioner,

v.

CITY OF OAKLAND, a California Municipal Corporation,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth and Sixth Circuits have held that municipal ordinances are content-based restrictions on free speech where those ordinances single out for regulation only donation bins—unattended receptacles used "to accept donated goods or items" or "for the collection or solicitation of donated goods." In this case, the Ninth Circuit held that a municipal ordinance was not content based when it applied only to receptacles used "to solicit donations/collections."

The question presented is: Is a regulation content based for purposes of the First Amendment where it applies only to unattended receptacles that solicit donations or collections?

PARTIES TO THE PROCEEDING BELOW

The petitioner in this case is Recycle for Change, and the respondent is the City of Oakland, California.

CORPORATE DISCLOSURE STATEMENT

Petitioner Recycle for Change has no parent company, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Recycle for Change, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion affirming the district court's decision was issued on May 9, 2017, in Case Number 16-15295. Pet. App. 1a-18a. The district court's opinion denying a preliminary injunction was issued on January 28, 2016. Pet. App. 19a-37a.

JURISDICTION

The Ninth Circuit Court of Appeals' decision and opinion was entered on May 9, 2017. This Court granted Recycle for Change an extension of time to file this petition to September 21, 2017. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides,

> Congress shall make no law * * * abridging the freedom of speech.

The Fourteenth Amendment provides,

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

1. Recycle for Change ("Recycle") is a California not-for-profit organization that maintains numerous unattended donation bins in municipalities throughout California. Recycle uses the bins to further its charitable mission through the collection of textiles. Donated items are recycled or resold by Recycle, and the ensuing revenue is used to fund various nonprofit efforts worldwide, particularly in low-income nations.

Recycle's donation bins are placed on private property with the permission of the property owner. The revenue generated by the bins constitutes the bulk of Recycle's income.

Several of Recycle's bins are located in the City of Oakland, California. When suit was filed in the district court, Recycle maintained 63 bins throughout the city.

2. In 2012, Oakland officials began exploring ways to regulate donation bins within city limits. In March 2012, several city council members met in committee and discussed the perception that donation bins like Recycle's were competing against local charities with a brick-and-mortar presence. One of the members in attendance stated that it was her "policy goal" to adopt a regulatory structure that would "deter * * * the non-local organizations [such as Recycle], many of which are for-profit and are scams."

Although Oakland later claimed that it was seeking to regulate donation bins out of concern for blight, there is no record of any blight-related complaint being made about any donation bin located anywhere in the city.

3. Ultimately, Oakland enacted Ordinance No. 13335 C.M.S. (the "Ordinance"), which added Chapter 5.19, "Unattended Donation/Collection Boxes," to the Oakland Municipal Code. By its terms, the Ordinance singles out a subset of unattended collection receptacles for regulation. Specifically, the Ordinance applies only to "[u]nattended donation/collection boxes" ("UDCBs") and to "UDCB operators." Pet. App. 41a. The Ordinance defines "UDCB" to mean "unstaffed drop-off boxes, containers, receptacles, or similar facility that accept textiles, shoes, books and/or other salvageable personal property items to be used by the operator for distribution, resale, or recycling." *Id.* "UDCB operator" is defined as "a person or entity who utilizes or maintains a UDCB to solicit donations/collections of salvageable personal property." *Id.*

The Ordinance imposes stringent constraints on donation bin operators. For example, the Ordinance restricts bin operators to narrow geographical limitations. No donation bin may be placed "within 1,000 feet" of any other donation bin nor may any donation bin appear within any of numerous specified zoning districts within the city. *Id.* at 51a-52a.

Moreover, donation bin operators must comply with an expensive and onerous permitting process every year. *Id.* at 41a-42a. The initial permitting fee is $535 per bin—a cost of $33,705 for Recycle's 63 bins. That does not include the costs that a charity like Recycle would need to incur to comply with the rest of the permitting preconditions. Those requirements are substantial. For example, each permit application must include vicinity maps showing the distance between the proposed donation

bin location and "all existing [donation bins] within 1,000 feet." *Id.* at 44a. Each application also must be accompanied by comprehensive site plans of each parcel, detailing the dimensions of all parcel boundaries and buildings. *Id.* The cost of complying with these requirements is prohibitive, especially for a charitable, not-for-profit organization whose income comes mostly from the donations of cast-off textiles.

Further, the Ordinance requires operators to purchase $1 million worth of general liability insurance and name the City of Oakland as an additional insured on the policy. *Id.* at 43a, 56a. These policies are likely to be expensive, because the Ordinance specifically provides for a private right of action against donation bin operators: the Ordinance may be enforced against a donation bin operator by "[a]ny person" who wants to file suit alleging a violation. *Id.* at 60a. If successful, the plaintiff may recover attorneys' fees, costs, and witness fees from the operator. *Id.*

4. If enforced, the Ordinance will eliminate a substantial portion of Recycle's donation bins in Oakland, based on the locational limitations alone. The fees and permitting requirements for the remaining bins are so onerous that Recycle may end its operations in Oakland altogether—precisely the goal that at least one member of Oakland's city council expressed in deciding how to structure the regulatory scheme.

Left with no other option, Recycle filed suit against Oakland in the district court, alleging in pertinent part that the Ordinance violates the First Amendment. Recycle moved for a preliminary injunction based on this claim.

In January 2016, the district court issued an order denying Recycle's motion for a preliminary injunction, concluding that the ordinance is content neutral and satisfies intermediate scrutiny. *Id.* at 19a-37a.

5. Recycle timely appealed the district court's decision, observing that it conflicts with decisions from two Circuits, both of which held that similar ordinances were content based. See *Planet Aid v. City of St. Johns*, 782 F.3d 318, 325–26 (6th Cir. 2015); *Nat'l Fed'n of the Blind of Tex. v. Abbott*, 647 F.3d 202, 212–13 (5th Cir. 2011). Although Oakland argued in its brief that the Ordinance was different from those in *Planet Aid* and *Abbott* because it applies equally to both for-profit and non-profit solicitation, Recycle pointed out that this is a distinction without a difference in light of the well-established rule that solicitation constitutes protected speech whether it is paid or unpaid. See, *e.g.*, *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 961 (1984); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

The Ninth Circuit affirmed. It declined to adopt other Circuits' conclusion that unattended donation bins are a form of speech or protected expression, instead "assum[ing] without deciding that the Ordinance triggers First Amendment analysis" only because Oakland had conceded the point. Pet. App. 4a.

The court then ruled that the Ordinance was not a content-based speech restriction for two reasons. First, the court reasoned that the Ordinance applies not only to donation bins soliciting charitable

donations, but to any bin that "accepts personal items 'for distribution, resale, or recycling.'" Pet. App. 6a. According to the Ninth Circuit, the fact that the Ordinance applies regardless of "*why* the UDCB operator is collecting the personal items, whether it be for charitable purposes or for-profit endeavors," means that the Ordinance does not apply solely to expression protected by this Court's decision in *Schaumburg*. Pet. App. 6a-7a.

Second, the court ruled that the fact that an officer must examine the content of the speech to determine whether the Ordinance applies does not render the Ordinance content based. *Id*. at 7a-8a. To reach this conclusion, the Ninth Circuit relied on its decision in *Reed v. Town of Gilbert*, 587 F.3d 966 (9th Cir. 2009)—a decision that was later overruled by this Court. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

Because the Ordinance was in its view content neutral, the Ninth Circuit applied intermediate scrutiny and held that it is sufficiently narrowly tailored to satisfy that intermediate standard. Pet. App. 15a-17a.

Recycle timely files this petition for certiorari.

The parties have agreed to stay all proceedings in the district court 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 GRANTING THE PETITION

I. The Circuits Are Split Over The Correct First Amendment Analysis For Donation Bins.

The Ninth Circuit created a split over whether laws that target donation bins for regulation are content-based restrictions on speech under the First Amendment.

1. Two courts of appeals and a district court—the Fifth Circuit (*National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202 (5th Cir. 2011)), the Sixth Circuit (*Planet Aid v. City of St. Johns*, 782 F.3d 318 (6th Cir. 2015)), and the District of Nebraska (*Linc-Drop, Inc. v. City of Lincoln*, 996 F. Supp. 2d 845 (D. Neb. 2014))—all hold that public receptacles that solicit donations or collections are entitled to robust First Amendment protection.

In *Abbott*, the Fifth Circuit addressed a Texas statute that "regulat[ed] the collection or solicitation of donated goods subsequently sold by for-profit entities or individuals." The law required "'for-profit entities' to make certain disclosures when collecting donated clothing or household goods through 'public donations receptacles,' when making telephone or door-to-door solicitations, and when making mail solicitations." 647 F.3d at 206 (citing TEX. BUS. & COM. CODE ANN. §§17.921-17.926). The act defined "for-profit entity" as "an entity other than a nonprofit entity" and "public donations receptacle" as "a large container or bin in a parking lot or public place that is intended for use as a collection point for clothing or household goods donated by the public." *Id.* at 206 n.1 (citing TEX. BUS. ORGS. CODE §1.002(26) & n.2 (citing TEX. BUS. & COM. CODE ANN. §17.921(4)). The act "require[d] for-profit solicitors who collect

donations through public receptacles to make three disclosures: (1) the solicitor's contact information; (2) that donations will be sold for profit; and (3) the amount of the flat fee paid for the charity by the solicitor." *Id.* at 211.[1]

On appeal, Texas argued that donation bins are merely commercial—that they "represent nothing more than an upturned palm." 647 F.3d at 212. The Fifth Circuit disagreed, holding that the bins were engaged in "charitable solicitations" and that Texas's regulations were therefore subject to strict scrutiny under *Schaumburg, Munson*, and *Riley*. The court explained that "[s]olicitation is not limited to in-person communication" and that the speech interests identified by this Court in *Schaumburg*—

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[1] The required disclosures are outlined in different provisions of the act and are "dependent on the relationship between the for-profit and the affiliated charitable organization." 647 F.3d at 206. Only the "(d) provisions" are relevant here because they were the only parts of the Texas law the plaintiffs had standing to challenge.

The "(d) provisions" govern where "the for-profit entity or individual pays to a charitable organization a flat fee that is not contingent on the proceeds generated from the sale of the donated items and the for-profit entity or individual retains a percentage of the proceeds from the sale," and require the following disclosure: "SOLICITATIONS FOR DONATIONS ARE MADE BY (NAME OF FOR-PROFIT ENTITY OR INDIVIDUAL) ON BEHALF OF (NAME OF CHARITABLE ORGANIZATION). Donations will be sold for profit by (name of for-profit entity or individual) and a flat fee of (insert amount) is paid to (name of charitable organization)." *Abbott*, 647 F.3d at 206 (quoting TEX. BUS. & COM. CODE ANN. §§17.922(d), 17.923(d), and 17.924(d)).

"communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes"—were "surely implicated by the public receptacles." *Id.* at 212–13. The court described donation bins as "silent solicitors and advocates for particular charitable causes." *Id.* at 213.

The Fifth Circuit explained that "[t]he mere inclusion of the name of a charity on a donation box communicates information about the beneficiary of the benevolence and explicitly advocates for the donation of clothing and household goods to that particular charity," and that "[a]t a minimum, the donation boxes implicitly advocate for that charity's views, ideas, goals, causes, and values." *Id.* at 213. Applying the standard in *Schaumburg*, *Munson*, and *Riley*—that a regulation is constitutional only if (1) it "serves a sufficiently strong, subordinating interest that the [government] is entitled to protect" and (2) it is "narrowly drawn * * * to serve the interest without unnecessarily interfering with First Amendment freedoms"—the Fifth Circuit held that the fee arrangement disclosure requirement for public receptacles is unconstitutional under the First Amendment. *Id.* at 213 (quoting *Munson*, 467 U.S. at 960–61). In other words, "[s]ame standard, same result" as in those controlling Supreme Court decisions. *Id.* at 214.

The Sixth Circuit reached a similar conclusion in *Planet Aid*. There, a non-profit charitable organization brought suit challenging the constitutionality of an ordinance in the City of St. Johns, Michigan, banning outdoor, unattended

charitable donation bins.[2] The plaintiff argued that "its speech regarding charitable giving is protected by the First Amendment and that the ordinance is a content-based restriction subject to strict scrutiny," whereas St. Johns argued that the bins were "analogous to outdoor advertising signs" and that the ordinance therefore was content neutral. 782 F.3d at 322–23.

The Sixth Circuit disagreed with the City. Relying on *Schaumburg*, *Munson*, *Riley*, and *Abbott*, the court held that "[a] charitable donation bin can—and does—'speak'" in a multitude of ways. *Id.* at 325. "A passer-by who sees a donation bin may be motivated * * * to research the charity" and "gain new information about the social problem the charity seeks to remedy." *Id.* The donation bin may also motivate citizens to donate. Or the passer-by may "be inspired to learn more about each charity's mission in deciding which charity is consistent with his values, thus influencing his donation decision." *Id.*

Accordingly, the Sixth Circuit held that "speech regarding charitable giving and solicitation is entitled to strong constitutional protection, and the fact that such speech may take the form of a donation bin does not reduce the level of its protection." *Id.* at 326. The Sixth Circuit concluded that the ordinance was content based because it did "not ban or regulate all unattended, outdoor

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[2] The St. Johns ordinance defined a "donation box" as "an outdoor, unattended receptacle designed with a door, slot, or other opening that is intended to accept donated goods or items." 782 F.3d at 322. The ordinance provided that "[n]o person, business or other entity shall place, use or allow the installation of a donation box within the City of St. Johns." *Id.*

receptacles." *Id.* at 328. To the contrary, the ordinance banned "only those unattended, outdoor receptacles with an expressive message on a particular topic—charitable solicitation and giving." *Id.* The court concluded that the ordinance was a content-based restriction on speech that did not survive strict scrutiny. *Id.* at 331.

The District of Nebraska similarly found that a city ordinance regulating donation drop boxes was subject to strict scrutiny under the First Amendment. In *Linc-Drop*, a for-profit organization challenged the constitutionality of a municipal ordinance in Lincoln, Nebraska, requiring a permit for donation drop boxes, limiting the issuance of permits to certain non-profit organizations, and requiring that at least 80% of the proceeds from the boxes be used for charitable purposes. 996 F. Supp. 2d at 847.[3]

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[3] The municipal ordinance provided that no person may "place or hold out to the public any donation box for people to drop off articles of unwanted household items, clothing or other items of personal property, unless at least 80% of the gross proceeds from the sale of such items shall be utilized for charitable purposes." *Linc-Drop*, 996 F. Supp. 2d at 848. The ordinance also prohibited the placement or use of a donation box without a permit from the city, and "only entities or organizations that have a tax status under Section 501(c)(3) of the Internal Revenue Code * * * or a public, parochial or private school, may apply for and obtain a permit." *Id.* at 848. In addition, a donation box must have "clearly identified, in writing, on its face the charitable organization that is maintaining the donation box." *Id.* at 849. In other words, for-profit companies cannot maintain donation boxes. *Id.*

Citing this Court's precedent and the Fifth Circuit's decision in *Abbott*, the court determined that the donation bins' "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Linc-Drop*, 996 F. Supp. 2d at 855 (quoting *Abbott*, 647 F.3d at 213). The court held that the ordinance's 80% requirement could not survive *Schaumburg*, *Munson*, and *Riley* and held the permit requirement unconstitutional because "the government cannot, consistent with the First Amendment, ban a charity from hiring a professional fundraiser." *Id.* at 857 (citing *Munson*, 467 U.S. at 967 n.16).

2. Here, in contrast, the Ninth Circuit held that Oakland's Ordinance regulating donation bins—and *only* donation bins—is content neutral and thus not subject to strict scrutiny under the First Amendment. The court reached this conclusion on the theory that the Ordinance "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.

In holding that the Ordinance is content neutral, the court departed sharply from its sister circuits. The Ninth Circuit opinion acknowledges *Planet Aid* (though not *Abbott* or *Linc-Drop*) but attempts to distinguish that case in a footnote:

> The ordinance in *Planet Aid* did not on its face make any distinction between UDCBs that engage in charitable solicitation and those that do not (such as UDCBs operated by for-

> profit companies). The ordinance in *Planet Aid* applied to "outdoor, unattended receptacles designed with a door, slot, or other opening that is intended to accept donated goods or items. The word "donation" need not have an exclusively charitable connotation. But it is clear from the court's discussion in *Planet Aid* that it interpreted the ordinance to apply only to receptacles soliciting donations to charitable causes.

Pet. App. 8a-9a.

In drawing this distinction between for-profit and non-profit solicitors, the Ninth Circuit implied that for-profit solicitations are *per se* less protected than non-profit solicitations. But the Ninth Circuit did not address—much less distinguish—this Court's precedent, which is directly to the contrary. See, *e.g.*, *Riley*, 487 U.S. at 795–96 (questioning whether "speech is necessarily commercial whenever it relates to [the speaker's] financial motivation for speaking" and declining, as did *Schaumburg* and *Munson*, to "parcel out" the "intertwined" protected speech from arguably less-protected speech). Indeed, *Riley*, *Munson*, *Abbott*, and *Linc-Drop* each involved for-profit solicitors, and in each case the Court struck down the regulation under the First Amendment.

As this Court has made clear, the "chill and uncertainty" created by ordinances regulating solicitation for charitable purposes "might well drive professional fundraisers out * * * or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately 'reduce

the quantity of expression.'" *Riley*, 487 U.S. at 794 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)). Where the "restriction is undoubtedly one on speech," it makes no difference whether "one views this as a restriction of the charities' ability to speak * * * or a restriction of the professional fundraisers' ability to speak." *Id.* (citing *Munson*, 467 U.S. at 967 & n.16, 955 n.6).[4]

In short, the Ninth Circuit's decision creates a clear split with decisions from the Fifth and Sixth Circuits, and the court's passing effort to distinguish one of those decisions relies on a legal distinction that this Court has long rejected.

II. The Ninth Circuit's Newly Announced Rule Cannot Be Squared With This Court's Precedent.

A law that regulates *only* donation bins and not their non-expressive equivalents—like dumpsters or recycling bins—is a content-based regulation on speech, and is thus presumptively unconstitutional.

Every court to take up this issue prior to the Ninth Circuit correctly concluded that donation bins can "speak." These courts recognized that the same speech values this Court found applicable to the in-person solicitors from *Schaumburg*, *Munson*, and

[4] See also *Abbott*, 647 F.3d at 207 (noting that the charities are "Texas nonprofit corporations that retain professional resellers to operate public receptacles intended for use as collection points for clothing and household goods donated by the public and to make solicitations of donations"); *Linc-Drop*, 996 F. Supp. 2d at 854 ("Linc-Drop *is* engaged in charitable solicitation. The fact that it is paid to do so does not change that.").

Riley applied with equal force to donation bins. *Abbott*, 647 F.3d at 213 (relying on *Schaumburg*, *Munson*, and *Riley* to conclude that donation bins are "silent solicitors," and that the "mere inclusion of the name of a charity on a donation box communicates information about the beneficiary of the benevolence and explicitly advocates for the donation of clothing and household goods to that particular charity"); *Planet Aid*, 782 F.3d at 318, 325 (relying on *Schaumburg*, *Munson*, *Riley*, and *Abbott* to conclude that a donation bin "can—and does—'speak'" and that its mere presence may "motivate citizens to donate clothing or shoes even if they had not previously considered doing so"); *Linc-Drop,* 996 F. Supp. 2d at 855 (relying on *Schaumburg*, *Munson*, and *Riley* to hold that the donation bin operator was engaged in constitutionally protected solicitation, and "[t]he fact that it is paid to do so does not change that").

This Court has consistently held that laws are content-based restrictions on speech when they target the subject matter of protected speech. Most recently, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), this Court held that a local ordinance was "content based on its face" where it treated "Ideological Sign[s]," "Political Sign[s]," and "Temporary Directional Signs" differently from one another. *Id.* at 2224–25, 2227. *Reed*, which was decided after *Planet Aid*, confirms the Sixth Circuit's approach for determining whether a law is content based. Compare *Reed*, 135 S. Ct. at 2227 (sign ordinance was content based where its "restrictions * * * depend[ed] entirely on the communicative content of the sign" and citing favorably a decision holding that a "law banning political signs but not commercial signs was content based" (*id.* at 2232)

(citation omitted)), with *Planet Aid*, 782 F.3d at 328–30 (ordinance banning only receptacles "intended to accept donated goods or items" was content based because it targeted "only those unattended, outdoor receptacles with an expressive message on a particular [protected] topic—charitable solicitation and giving" and did not "apply with equal force to non-expressive receptacles" like dumpsters or recycling bins).

Reed is not unique among this Court's decisions. For example, *Cincinnati v. Discovery Network*, *Inc.*, 507 U.S. 410 (1993), held that an ordinance was content based because it regulated newsracks distributing "commercial handbills" but not newsracks distributing "newspapers." *Id.* at 410–11. The ordinance was content based because "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack." *Id.* at 429. And it is black-letter First Amendment law that when a regulation "is based on the content of speech" the regulation is presumptively unconstitutional. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980).

The same principles apply here. Oakland's Ordinance regulated an unattended receptacle only if it is a donation bin—that is, *only* if it is engaged in protected speech. Because the Ordinance treats a donation bin differently from its non-expressive counterparts, such as dumpsters, it is a content-based restriction on free speech. Donation bins express ideas "characteristically intertwined" with high-value speech, *Schaumburg*, 444 U.S. at 632, while dumpsters do not. See *Planet Aid*, 782 F.3d at 328–30. Thus, under this Court's precedent and "by any commonsense understanding of the term,"

Discovery Network, 507 U.S. at 429, the Ordinance is a content-based restriction on speech and presumptively unconstitutional.

The Ninth Circuit was also wrong to rely upon its own reversed decision in *Reed v. Town of Gilbert* and to reject the "'officer must read it' test" * * * 'as a bellwether of content.'" Pet. App. 7a-8a (quoting *Reed*, 587 F.3d at 978). This Court has repeatedly held that a law "would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (quoting *F.C.C. v. League of Women Voters*, 468 U.S. 364, 383 (1984)).

Finally, it is clear from the record that the Oakland City Council enacted the Ordinance to combat what it perceived as "scam" charities. Protecting the public from fraud is an old refrain, commonly relied upon by government actors seeking to restrict the First Amendment rights of charitable solicitors. It was a principal justification for the restrictions at issue in *Schaumburg*, 444 U.S. at 636, *Munson*, 467 U.S. at 966, and *Riley*, 487 U.S. at 792. But in none of those cases was the restriction sufficiently tailored to supplant the speech interests of the solicitors, and neither is the Ordinance sufficiently tailored to pass constitutional muster. As this Court explained in *Riley*:

> [W]e do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it. Further North Carolina may constitutionally require fundraisers to disclose certain financial

> information to the State. * * * If this is not the most efficient means of preventing fraud, *we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency*.

487 U.S. at 795 (emphasis added, citation omitted). The Ninth Circuit's opinion—which rests upon analysis that this Court has already discredited—is at odds with this Court's precedent.

III. The Issue Presented Is Important And Recurring.

1. As donation bins have proliferated, so have government efforts to regulate them, making it inevitable that the issue presented here will recur. Municipalities, counties, and states in *every* federal judicial circuit have passed laws restricting donation bins. These laws have ranged from outright bans on donation bins (like the St. Johns ordinance that the Sixth Circuit struck down), to regulations that incorporate permitting requirements or zoning restrictions (like Oakland's Ordinance in this case), or disclosure obligations (like the Texas law that the Fifth Circuit struck down). And many, if not most, of these laws have been enacted within the past half-decade.[5]

[5] A non-exhaustive sample of relevant ordinances applying to donation bins includes the following: *First Circuit:* ASHLAND, MASS., CODE §126-1, *et seq.* (2016); FALMOUTH, MASS., CODE §105-1 *et seq.* (2015).

Second Circuit: CONN. GEN. STAT. §21a-430 (2009); N.Y. GEN. BUS. LAW §399-bbb (2011); COLONIE, N.Y., CODE §63-1 *et seq.* (2016).

Though not identical, these laws share one critical feature: they single out donation bins for strict regulation. Without this Court's intervention and guidance, these laws will continue to propagate, subject to conflicting First Amendment protections.

Third Circuit: WALL, N.J., CODE §96-1, *et seq.* (2011); PENNSBURG, PA., CODE §38A, *et seq.* (2014); PHILADELPHIA, PA., CODE §9-4201 *et seq.* (2015).

Fourth Circuit: FAIRFAX CTY., VA., ZONING ORDINANCE §10-102, ¶ 34 (2015).

Fifth Circuit: BEDFORD, TEX., ZONING ORDINANCE §5.13.A; LAKE JACKSON, TEX., CODE OF ORDINANCES §18-1, *et seq.* (2014); SOUTHLAKE, TEX., ZONING ORDINANCE §45.13.

Sixth Circuit: TENN. CODE ANN. §48-101-513(m) (2015); SYLVANIA, OHIO, CODIFIED ORDINANCES, §1167.04 (2015); LOUISVILLE, KY., METRO CODE OF ORDINANCES §156.052(J) (2014).

Seventh Circuit: GRAFTON, WIS., MUNICIPAL CODE §19.03.0803(K) (2012); SCHAUMBURG, ILL., CODE OF ORDINANCES §154.63(F)(11) (2012); SOUTH BEND, IND., CODE OF ORDINANCES §4-38 (2014).

Eighth Circuit: MINNEAPOLIS, MINN., CODE OF ORDINANCES §282.10, *et seq.* (2014); FLORISSANT, MO., CODE §605.565, *et seq.* (2010); OVELAND, MO., CODE §400.335 (2014).

Ninth Circuit: SIMI VALLEY, CAL., CODE OF ORDINANCES §9-35.070 (2013); GARDEN GROVE, CAL., MUNICIPAL CODE §9.50, *et seq.* (2014).

Tenth Circuit: OKLA. STAT. ANN. TIT. 78, §56 (2008); AURORA, COLO., BUILDING & ZONING CODE §146-1202 (2001).

Eleventh Circuit: ORLANDO, FLA. CODE OF ORDINANCES §58.800, *et seq.* (2015); BROWARD CTY., FLA. CODE OF ORDINANCES §39-110, *et seq.* (2014).

Indeed, in this regard the Ninth Circuit's opinion below is particularly troubling due to the false dichotomy it creates between "charitable" and "for-profit" donation bins, suggesting that lawmakers can avoid the problems with "content based" laws that target "charitable" solicitations simply by drafting regulations that also apply to "for-profit" donation bins. Pet. App. 6a-7a. This ignores Supreme Court precedent that "for-profit" enterprises also engage in protected First Amendment activity, which such regulations unlawfully target.

Moreover, the split in authorities created by the Ninth Circuit's decision has already caused analytical confusion over the scope of *Schaumburg*'s applicability to laws regulating solicitation. Compare Bart W. Brizzee & Deborah J. Fox, REED'S IMPACT ON SOLICITATION ORDINANCES: REGULATING CONTENT, CONDUCT OR COMMUNICATION?, 5 League of California Cities 2017 Annual Conference & Expo (Sept. 15, 2017)[6] (concluding that, "[i]nstead of relying on *Schaumburg*," the Sixth Circuit in *Planet Aid* relied on this Court's cases "regarding time, place, and manner restrictions"), with *Planet Aid*, 782 F.3d at 323–25, 330 (repeatedly citing *Schaumburg* and relying on *Schaumburg*, *Munson*, and *Riley* to apply strict scrutiny).

2. Moreover, by playing a vital role in recycling used clothing and other textiles, donation bins implicate important social and environmental

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[6] Available at http://www.cacities.org/Resources-Documents/Member- Engagement/Professional-Departments/City-Attorneys/Library/2017/2017-Annual-Conference-CA-Track/D-Fox-Reed-s-Impact-on-Solicitation-CA-Track-AC-20.aspx (accessed Sept. 19, 2017).

interests. According to recent EPA estimates, textiles accounted for 16.22 million tons of municipal solid waste in 2014—about 6% of total waste generation nationwide—up from 15.13 million tons in 2013, and 14.33 million tons in 2012.[7] Only 16.2% of those textiles were recycled, resulting in 13.6 million tons of textiles going to a landfill or incinerator (up from 12.83 million tons in 2013 and 12.08 million tons in 2012).[8]

Put another way, the average American threw away more than 85 pounds of textiles that were not recycled or reused.[9] In addition to taking up landfill space and contributing to pollution caused by incinerators, this is substantially increasing the nation's carbon footprint: the EPA estimates that the reduction in greenhouse gases from recycling textiles

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[7] U.S. EPA, ADVANCING SUSTAINABLE MATERIALS MANAGEMENT: 2014 FACT SHEET, at 8 (Nov. 2016) ("2014 Fact Sheet"); U.S. EPA, ADVANCING SUSTAINABLE MATERIALS MANAGEMENT: 2013 FACT SHEET, at 8 (June 2015) ("2013 Fact Sheet"); U.S. EPA, MUNICIPAL SOLID WASTE GENERATION, RECYCLING, AND DISPOSAL IN THE UNITED STATES: FACTS & FIGURES FOR 2012, at 6 (Feb. 2014) ("2012 Fact Sheet"). These fact sheets are available at https://www.epa.gov/smm/advancing-sustainable-materials-management-facts-and-figures-report (accessed Sept. 12, 2017); see also Alden Wicker, *Fast Fashion Is Creating An Environmental Crisis*, Newsweek.com (Sept. 1, 2016 6:40 A.M.),http://www.newsweek.com/2016/09/09/old-clothes- fashion -waste-crisis -494824.html (accessed Sept. 12, 2017).

[8] 2014 Fact Sheet 8; 2013 Fact Sheet 8; 2012 Fact Sheet 6.

[9] This calculation is based on the U.S. Census Bureau's population estimate for 2014.

in 2014 was the equivalent of removing 1.3 million cars from the road for that year.[10]

Donation bins directly contribute to reducing waste, pollution, and greenhouse gases by encouraging Americans to donate and recycle their used clothing and textiles. As a leading trade association for donation bin operators explained, its member companies are "committed to the 'green' way of life," and "continually trumpet their message to the donating and recycling public by encouraging them to 'Donate, Recycle, Don't Throw Away.'"[11]

Recycle's own website urges, "We have the power to preserve a significant amount of resources by reusing and recycling textiles and our collection boxes are a very simple way to do just that."[12] In addition to its "[e]nvironmental [i]mpact," Recycle's website also promotes the "[s]ocial [i]mpact" and "[e]conomic [i]mpact" of its donation bin program, which generates proceeds used to support "sustainable development work" and "the fight against extreme poverty"; provides a source of second-hand clothing for "people who cannot afford to buy new clothes"; and creates jobs "in the used clothing business."[13] And "clothing collection"

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[10] 2014 Fact Sheet 15.

[11] Secondary Materials and Recycled Textiles (SMART), "Media Kit," available at https://www.smartasn.org/SMARTASN/assets/File/resources/SMART_PressKitOnline.pdf (accessed Sept. 12, 2017).

[12] *Environmental Impact*, RECYCLE FOR CHANGE, http://www.recycleforchange.org/environmental-impact (accessed Sept. 12, 2017).

[13] *Social Impact*, RECYCLE FOR CHANGE, http://www.recycleforchange.org/social-impact

provides "a way everyone, in every financial situation, can make a difference."[14] The primary means by which companies like Recycle "trumpet" their "message" to the public is by locating donation bins in local communities across the country.

In short, the issues presented in this Petition are important, and with so many new laws taking effect, new suits are likely to blossom at an increasing rate nationwide. This Court's guidance is needed. A circuit split has already developed. And if the Ninth Circuit's ruling is incorrect, as we contend it is, then, left standing, it will provide a roadmap for jurisdictions to violate First Amendment rights.

IV. The Case Is An Excellent Vehicle For Resolving The Circuit Split.

This case squarely presents the question whether a law amounts to a content-based speech regulation when it applies only to unattended receptacles that solicit donations or collections. The answer to that question is dispositive of this case. Indeed, the City of Oakland agrees with Petitioner that all proceedings in the district court should remain stayed until this Court reaches a disposition on the certiorari petition, and if the petition is granted, until the Court issues a decision on the merits.[15] If the Court decides not to review the case and reverse the Ninth Circuit's opinion, it would spell the end of

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[14] *Economic Impact*, RECYCLE FOR CHANGE, http://www.recycleforchange.org/economic-impact (accessed Sept. 12, 2017).

[15] See *Recycle for Change v. City of Oakland*, 3:15-cv-05093-WHO (N.D. Cal.), Dkt. 57.

Petitioner's case.[16] Moreover, the Ninth Circuit addresses the question presented thoroughly in a published opinion.

Oakland's ordinance would have been struck down under the First Amendment in the Fifth or Sixth Circuits. Only this Court can resolve this inconsistency on an important and recurring issue of First Amendment law.

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[16] 28 U.S.C. § 1254(1) gives the Supreme Court certiorari jurisdiction to review cases in the federal courts of appeals "before or after rendition of judgment or decree." See Stephen M. Shapiro *et al.*, *Supreme Court Practice*, §2.3, at 83 (10th ed. 2013). The Court has granted review of nonfinal orders of the courts of appeals involving important issues "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (granting certiorari review and reversing district court's denial of a motion to dismiss complaint); see also, *e.g.*, *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945) (granting certiorari to review an appellate order remanding a case for a new trial, "inasmuch as it is fundamental to the further conduct of the case"); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (noting that the Court has jurisdiction to hear appeals from motions to dismiss based on qualified immunity).

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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SEPTEMBER 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16-15295

RECYCLE FOR CHANGE,
Plaintiff-Appellant,

v.

CITY OF OAKLAND, a California Municipal Corporation,
Defendant-Appellee.

Filed May 9, 2017

Argued and Submitted September 13, 2016,
San Francisco, California

Before: RONALD M. GOULD and MARSHA S. BERZON, *Circuit Judges*.

JOHN R. TUNHEIM,* *Chief District Judge*.

Opinion

GOULD, *Circuit Judge*:

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* The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

Recycle for Change ("RFC"), a California non-profit corporation, challenges the City of Oakland's ("Oakland") ordinance regulating unattended donation collection boxes ("UDCBs") as inconsistent with the First Amendment. RFC sought a preliminary injunction from the district court, which the court denied. RFC appeals that order. Assuming UDCBs constitute protected speech or expressive conduct—an issue we do not decide—we hold that RFC is unlikely to succeed on the merits of its First Amendment claim because the ordinance is content neutral and survives intermediate scrutiny. We affirm the denial of preliminary injunctive relief.

RFC recycles and reuses donated materials for dual purposes: to conserve environmental resources and to raise funds to be donated to various charities. RFC operates UDCBs in Oakland as a method of collecting donated materials from the public. RFC places UDCBs on private property with the property possessor's permission. The revenue RFC generates from its UDCB operations is a significant part of its overall income.

On October 20, 2015, Oakland enacted Ordinance No. 13335 C.M.S. (the "Ordinance"). Adding Chapter 5.19 to the Oakland Municipal Code, the Ordinance created a comprehensive licensing scheme governing the operation of UDCBs within city limits. By its terms, the Ordinance applies only to UDCBs, which it defines as "unstaffed drop-off boxes, containers, receptacles, or similar facility that accept textiles, shoes, books and/or other salvageable personal property items to be used by the operator for distribution, resale, or recycling." Oakland Mun. Code § 5.19.050. With exceptions irrelevant to this case, the Ordinance makes it "unlawful to place, op-

erate, maintain or allow a UDCB on any real property unless the parcel owner/agent and/or operator first obtain[s] an annually renewable UDCB permit from the City." *Id.* § 5.19.060(A). To obtain a permit, an operator must, *inter alia*, pay an application fee that costs about $535, propose a site plan, and obtain at least one million dollars in liability insurance. *Id.* § 5.19.070. The annual license renewal fee is about $246. The Ordinance sets restrictions on box placement location and size, requires specific periodic maintenance, and prohibits placing a UDCB within one thousand feet of another UDCB. *Id.* §§ 5.19.120, 5.19.130.

RFC sued Oakland, asserting that the Ordinance violates the Free Speech and Equal Protection Clauses of the United States Constitution and Article 1, Sections 2 and 7 of the California Constitution. RFC filed a motion for a preliminary injunction against enforcement of the Ordinance based on the federal constitutional claims only. The district court denied RFC's motion after finding that RFC (1) is unlikely to succeed on the merits on its First Amendment claim because the Ordinance is content neutral and survives intermediate scrutiny, (2) is unlikely to succeed on the merits on its Fourteenth Amendment claim because the Ordinance survives rational basis review, and (3) failed to demonstrate likelihood of irreparable harm. RFC appeals the district court's order with respect to its First Amendment claim only.

II

This court has jurisdiction to review an order refusing a preliminary injunction. 28 U.S.C. § 1292(a)(1). We review the district court's weighing of the relevant factors for abuse of discretion, but its underlying conclusions of law *de novo*. *See Int'l Fran-*

chise Ass'n v. City of Seattle, 803 F.3d 389, 398 (9th Cir. 2015).

"A plaintiff seeking a preliminary injunction must establish that [it] is [1] likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). We consider these factors on a sliding scale, such "that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). RFC contends that the district court erred by concluding that RFC was unlikely to succeed on the merits of its First Amendment claim and would not suffer irreparable injury absent an injunction. Because we reject RFC's first argument, we do not reach the second.

III

The first step of First Amendment analysis is to determine whether the regulation implicates protected expression. In its briefing, Oakland does not dispute RFC's contention that UDCBs in some respects constitute expression, and so enjoy a measure of protection under the First Amendment. Because we conclude that RFC is unlikely to succeed on the merits of its claim even if that is so, we assume without deciding that the Ordinance triggers First Amendment analysis.

So assuming, we begin from the recognition that charitable solicitations are protected speech. *See Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980).

The Ordinance impacts to a degree RFC's ability to communicate its charitable solicitations message on private property.

Next, we must ask whether the Ordinance is content based or content neutral. If content based, we review it using strict scrutiny. *See Reed v. Town of Gilbert*, — U.S. —, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015). If, however, such a law does not "suppress[ ] expression out of concern for its likely communicative impact," we ordinarily apply intermediate scrutiny (or, as described below, a version of intermediate scrutiny unique to incidental regulation of expressive conduct).[1] *United States v. Swisher*, 811 F.3d 299, 314 (9th Cir. 2016) (en banc) (quoting *United States v. Eichman*, 496 U.S. 310, 317, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990)); *see also United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

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[1] We note that although the content-based/content-neutral distinction has in recent years become largely determinative of the applicable level of scrutiny even as to regulation of fully private speech, the distinction originated in specialized areas of First Amendment analysis. *See generally* Daniel A. Farber, *The First Amendment* 23–41 (4th ed. 2014). The Supreme Court has never held that broad, content-neutral censorship of fully private speech would be subject to less than strict scrutiny. *Cf. Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575, 107 S.Ct. 2568, 96 L. Ed. 2d 500 (1987) (holding that a "ban [on all speech] cannot be justified even [in] a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech"). For present purposes, however, the content-based/content-neutral distinction governs.

A

A content-based law is one that "target[s] speech based on its communicative content" or "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2226–27. The "crucial first step" in determining whether a law is content based is to "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* at 2227–28 (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011)). We also apply strict scrutiny if the law is facially neutral but "cannot be 'justified without reference to the content of the regulated speech,' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). Here, 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 UDCBs.

RFC argues that the Ordinance is content based because an enforcing officer would have to examine a container's message and determine whether the container solicits charitable donations to determine whether a receptacle is subject to the Ordinance's requirements. We reject this argument for two reasons. First, it is factually incorrect. The Ordinance's application is not limited to UDCBs soliciting charitable donations. It applies to any unattended structure that accepts personal items "for distribution, resale, or recycling." Oakland Mun. Code § 5.19.050. It does

not matter *why* the UDCB operator is collecting the personal items, whether it be for charitable purposes or for-profit endeavors. The record notes that one of the largest UDCB operators in Oakland is USAgain, a for-profit company. To enforce the Ordinance, an officer need only determine whether (1) an unattended structure accepts personal items and (2) the items will be distributed, resold, or recycled.

Second, that an officer must inspect a UDCB's message to determine whether it is subject to the Ordinance does not render the Ordinance *per se* content based. While at times we have used this "enforcing officer" test to explain why a law is content based, *e.g.*, *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1200 (9th Cir. 2016); *S.O.C., Inc. v. Cty. of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998); *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998), we—and the Supreme Court—have also cautioned that an officer's inspection of a speaker's message is not dispositive on the question of content neutrality. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 721, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) ("It is common in the law to examine the content of a communication to determine the speaker's purpose.... We have 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."); *Berger v. City of Seattle*, 569 F.3d 1029, 1052 (9th Cir. 2009) ("Our conclusion that the active solicitation ban is content based *is supported—but not determined*—by the fact that an officer seeking to enforce the active solicitation ban must necessarily examine the content of the message that is conveyed." (emphasis added) (internal quotation marks omitted)). And this is for good reason. The "officer must read it" test cuts too broadly if used

"as a bellwether of content. If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based." *See Reed v. Town of Gilbert*, 587 F.3d 966, 978–79 (9th Cir. 2009), *rev'd on other grounds*, 135 S. Ct. at 2232 (2015).[2]

We are left with the following question: does a law that requires an enforcing officer to decide whether a UDCB collects personal items for the purpose of distributing, reusing, or recycling those items—regardless of the purposes of such activity—discriminate on the basis of content? Or, stated another way, does the activity of collecting, distributing, reusing, or recycling personal items—or the solicitation of items to further such activity—constitute "communicative content," *Reed*, 135 S. Ct. at 2227, against which any hint of discrimination should trigger strict scrutiny? We think not.

The Sixth Circuit's decision in *Planet Aid v. City of St. Johns*, 782 F.3d 318 (6th Cir. 2015), is instructive. There, the court determined that the City of St. John's ordinance banning 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.[3] The court explained that, because

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[2] While the Supreme Court reversed our court in *Reed*, the Court held only that the sign regulation was content based on its face because its application depended "entirely on the communicative content of the sign." 135 S.Ct. at 2227. It did not adopt, or even discuss, the merits of the "officer must read it" test as a proper content-neutrality analysis.

[3] The ordinance in *Planet Aid* did not on its face make any distinction between UDCBs that engage in charitable solicitation

the First Amendment protects speech soliciting charitable donations, *see Vill. of Schaumburg*, 444 U.S. 620, 100 S. Ct. 826, the message expressed by UDCBs accepting charitable donations constitutes "content." *See Planet Aid*, 782 F.3d at 324–26. Because St. John's ordinance targeted only those bins engaging in a specific kind of protected expression, it was content based. *Id.* at 328. As the court explained, the St. Johns ordinance "ban[ned] altogether an entire subclass of [bins] ... with an expressive message protected by the First Amendment." *Id.* at 329–30. *Planet Aid* is instructive because it helps give meaning to the term "content" when we ask whether a law discriminates on the basis of content. In *Planet Aid*, the bins' message of charitable giving was viewed as "content" because it is a particular kind of protected speech.[4]

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and those that do not (such as UDCBs operated by for-profit companies). The ordinance in *Planet Aid* applied to "outdoor, unattended receptacle[s] designed with a door, slot, or other opening that is intended to accept donated goods or items." 782 F.3d at 322. The word "donation" need not have an exclusively charitable connotation. *See* Oxford English Dictionary (defining donation as "[t]he action or faculty of giving or presenting; presentation, bestowal; grant," "[t]he action or right of bestowing or conferring a benefice; the 'gift,'" and "[t]he action or contract by which a person transfers the ownership of a thing from himself to another"), *available at* http://www.oed.com/view/Entry/56742?redirectedFrom=donation#eid (last viewed on December 16, 2016). But it is clear from the court's discussion in *Planet Aid* that it interpreted the ordinance to apply only to receptacles soliciting donations to charitable causes. *Id.* at 328 ("The ordinance.... bans only those unattended, outdoor receptacles with an expressive message on a particular topic—*charitable solicitation and giving*." (emphasis added)).

[4] We also note that the *Planet Aid* court missed an important step in its analysis—it did not clarify whether a UDCB collecting charitable donations engages in pure speech or expressive

Another helpful example is seen in the Supreme Court's opinion in *Reed*, in which the plaintiffs challenged an ordinance distinguishing between "temporary directional signs," "political signs," and "ideological signs." 135 S. Ct. at 2227. The Court explained that such distinctions were based on content because each sign type represented a particular protected message:

> The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech.

Id.

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conduct. For purposes of our analysis, we assume certain messages regarding charitable solicitation displayed on a bin constitute protected speech, but the bin itself is, at best—and this assumption is generous—expressive conduct rather than pure speech. *See Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999) ("Non-verbal conduct implicates the First Amendment when it is intended to convey a 'particularized message' and the likelihood is great that the message would be so understood." (quoting *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L. Ed. 2d 342 (1989)).

By contrast, here 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. It discriminates on the basis of non-expressive, non-communicative conduct. Although collecting donations to further charitable causes is "content" because it is "intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," *Schaumburg*, 444 U.S. at 632, 100 S. Ct. 826, that is not the Ordinance's target. Instead, the Ordinance regulates the unattended collection of personal items for distribution, reuse, and recycling, without regard to the charitable or business purpose for doing so. That conduct is neither expressive nor communicative.

In this sense, the Ordinance is more similar to the law in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994), which the Supreme Court held to be content neutral. There, cable companies challenged the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, which required "cable operators to carry the signals of a specified number of local broadcast television stations." *Id.* at 630, 114 S. Ct. 2445. The Court explained that the requirement was content neutral because, despite "interfer[ing] with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations," it 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.* at 644–45, 114 S. Ct. 2445. The same is true here: the purpose of, or message expressed by, RFC's UDCBs

is irrelevant to whether they are subject to the Ordinance's requirements.

We recognize, as RFC argues, that the Ordinance burdens RFC's ability to erect UDCBs by, for example, limiting the locations in which it can operate UDCBs and imposing additional costs. And assuming, as we have, that RFC's charitable UDCBs implicate First Amendment protected expression, the zoning limitations would burden to a degree RFC's ability to express its protected charitable solicitation message. But those considerations alone do not make the Ordinance content based. Rather, to prove that the Ordinance is a content-based regulation of expressive conduct, RFC would have to show that the law applies to its UDCBs *because* the bins engage in charitable solicitation. *See Swisher*, 811 F.3d at 314 (noting a content-based restriction of symbolic speech "suppresses expression out of concern for its likely communicative impact" (quoting *Eichman*, 496 U.S. at 317, 110 S. Ct. 2404)); *cf. Ward*, 491 U.S. at 791, 109 S. Ct. 2746 ("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."). On its face, the Ordinance does not do so.

In sum, the Ordinance restricts the boxes themselves, as collection devices for discarded material. 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 donations will be put. The Ordinance is therefore content neutral to the extent it regulates speech or expressive activity at all.

Having concluded that the Ordinance is content neutral on its face, we must also ask whether there is evidence that Oakland passed the Ordinance with an intent to burden RFC's charitable message. Strict scrutiny is the appropriate level of review if the Ordinance "cannot be justified without reference to" RFC's charitable message, or if the Ordinance "[was] adopted ... because of disagreement with" RFC's charitable message. *Reed*, 135 S. Ct. at 2227 (internal quotation marks omitted) (quoting *Ward*, 491 U.S. at 791, 109 S. Ct. 2746).

During oral argument, RFC argued that the purpose of the Ordinance was to support brick-and-mortar charity organizations, that is, organizations that run manned storefronts. RFC waived this argument because it never raised it in its briefs, other than in a terse one-sentence footnote. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief.... [A] bare assertion does not preserve a claim ..."); *Harger v. Dep't of Labor*, 569 F.3d 898, 904 n.9 (9th Cir. 2009) (argument raised for first time during oral argument will not be considered). But even if we considered the merits of this argument, we would reject it. That Oakland intended to benefit charity organizations that operate in brick-and-mortar stores is not discrimination on the basis of RFC's message. Rather, it discriminates based on *how* RFC solicits charitable donations. Because RFC does not demonstrate how the operation of UDCBs, rather than operation of a brick-and-mortar store, is connected with its message of charitable solicitation, this argument does not demonstrate an intent to discriminate on the basis of content. *See Leathers v. Medlock*, 499 U.S. 439, 449, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991) (holding that a

tax imposed on cable television operators but not print media was content neutral because, *inter alia*, there was no evidence that the speech expressed by the exempt media and non-exempt media "differ[ed] systematically in [their] message").

The record does not support the contention that Oakland passed the Ordinance with an intent to burden the message expressed by RFC's UDCBs. The Ordinance can be justified by "other considerations": the record suggests that the City Council enacted the Ordinance out of concern 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, and the Ordinance itself 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, Oakland Mun. Code § 5.19.010. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). Nor does RFC point to any evidence in the record that anyone in the Oakland City Council disagreed with RFC's message.

Because the Ordinance does not, by its terms, discriminate on the basis of content, and there is no evidence that Oakland enacted the Ordinance with an intent to burden RFC's message of charitable solicitation or out of any disagreement with that message, the Ordinance is content neutral.

B

Having concluded that the Ordinance is content neutral,[5] we now consider whether it survives the intermediate scrutiny standard outlined in *O'Brien*. *See Wilson v. Lynch*, 835 F.3d 1083, 1096 (9th Cir. 2016). "Under *O'Brien*, 'a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Id.* (quoting *O'Brien*, 391 U.S. at 377, 88 S. Ct. 1673). We hold that the Ordinance satisfies this level of scrutiny.

Oakland argues that it enacted the Ordinance to combat blight, illegal dumping, graffiti, and traffic impediments that endanger drivers and pedestrians. *See also* Oakland Mun. Code § 5.19.010. These efforts are within the constitutional power of the government and constitute a substantial governmental interest. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) ("Nor can there be substantial doubt that the twin goals ... [of] traffic safety and the appearance of the city[ ]are substantial governmental goals."). The regulation of UDCB placement and upkeep plainly serves these stated interests. By their nature, unattended bins invite blight, illegal dumping, and graffiti issues. And, as discussed above, the-

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[5] Again, we assume for the purposes of this decision that the Ordinance affects RFC's ability to engage in a form of protected expression related to charitable solicitation.

se interests are unrelated to the suppression of the UDCB operators' speech.

Finally, the means by which the Ordinance pursues Oakland's goal of combating the negative impacts associated with UDCBs are "narrowly tailored." In the context of content-neutral laws challenged under the First Amendment, a regulation may be narrowly tailored even though it is "not ... the least restrictive or least intrusive means" of pursuing the substantial governmental interest. *Ward*, 491 U.S. at 798, 109 S. Ct. 2746. "[T]he requirement of narrow tailoring is satisfied so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.... [and s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Id.* at 799–800, 109 S. Ct. 2746 (internal quotation marks omitted).

The Ordinance combats blight, illegal dumping, and graffiti by requiring a thousand feet of distance between UDCBs operations. As explained in the Interim City Administrator's report, "clustering of UDCBs can create the appearance of an informal dumping area and attract unintended items such as couches, appliances, and electronics." The report also explains that such distances requirements are common to prevent secondary effects produced by other kinds of operations that generate waste or are the focus of "undesirable, nuisance-related activities." The thousand-feet-distance requirement is not substantially broader than necessary to achieve the goal of combating blight, dumping, and graffiti, and without that requirement, those negative secondary effects would be worse. The same is true for the traffic-related dangers. The Ordinance combats traffic-

related negative secondary effects by requiring that UDCBs only be placed in particular areas so as to accommodate the truck traffic required for maintenance.

While RFC argues that these location restrictions will significantly decrease their UDCB operations, the Administrator's report explains, "there are still reasonable opportunities to site new UDCBs in more appropriate locations." We agree with the district court that reasonable alternative avenues of communication for RFC to express its message of charitable solicitation remain in Oakland. RFC may continue to operate UDCBs pursuant to the Ordinance's requirements, and it also may solicit charitable donations in ways other than operating an unattended collection box. *See Young v. City of Simi Valley*, 216 F.3d 807, 817 (9th Cir. 2000). Finally, the evidence does not suggest that the initial or annual licensing fees are designed to do anything other than defray administrative costs. Such fees do not facially violate the First Amendment. *See Kaplan v. Cty. of Los Angeles*, 894 F.2d 1076, 1081 (9th Cir. 1990); *see also Kwong v. Bloomberg*, 723 F.3d 160, 165–66 (2d Cir. 2013).

In sum, the Ordinance plainly serves important governmental interests unrelated to the suppression of protected speech. The Ordinance is sufficiently narrowly tailored and leaves alternative avenues of communication for RFC to express its message. The district court did not err in concluding that RFC is unlikely to succeed on the merits of its First Amendment claim.

IV

On appeal, RFC argues that it will suffer irreparable harm on the sole ground that it will experience a "loss of First Amendment freedoms." *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). Because we hold that RFC did not demonstrate that it is likely to succeed on the merits of its First Amendment claim, we need not address RFC's irreparable harm argument. We note, however, that the argument is derivative of RFC's assertion that it is likely to succeed on the merits.

V

Assuming the Oakland Ordinance implicates protected speech or expressive conduct, it is not content based and survives intermediate scrutiny. RFC has not shown that it is likely to succeed on the merits of its First Amendment claim.

APPENDIX B

UNITED STATES DISTRICT COURT, NINTH DISTRICT CALIFORNIA

RECYCLE FOR CHANGE,
Plaintiff,

v.

CITY OF OAKLAND,
Defendant.

No. 15-cv-05093-WHO

Signed: January 28, 2016

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. Nos. 22, 23

WILLIAM H. ORRICK, *United States District Judge*

INTRODUCTION

On October 20, 2015, the Oakland City Council passed Ordinance No. 13335 C.M.S. ("the Ordinance") to regulate unattended donation and collection boxes ("UDCB") within the Oakland city limits. Plaintiff Recycle for Change ("Recycle"), a nonprofit organization that utilizes UDCBs to receive charitable donations of used textiles that it then recycles, seeks to enjoin the Ordinance because it violates Recycle's rights under the First and Fourteenth Amendments. I find that intermediate scrutiny ap-

plies and that the Ordinance is a reasonable time, place, and manner regulation. Recycle has not shown that it is likely to prevail on the merits, nor has it shown irreparable injury. I heard argument on January 13, 2016, and now DENY Recycle's motion.

BACKGROUND

As part of its mission, Recycle collects used clothing and other textiles and uses revenue generated from its recycling and reuse activities to generate financial support for other nonprofits that are working to fight poverty around the world. Comp. ¶8 [Dkt. No. 1]. In furtherance of these goals, Recycle operates and maintains UDCBs to receive donations of unwanted clothing and other items from individuals. *Id.* ¶12. Recycle's UDCBs are made of steel, and are approximately 7 feet tall, 3 feet wide, and 4 feet deep. *Id.* ¶13. The UDCBs have a chute in the front, much like a mailbox, where people can deposit their donations. *Id.* ¶14. The bins are painted and clearly marked as belonging to Recycle. *Id.* The UDCBs are placed on private property with permission from the property possessors. *Id.* These placements are generally secured after Recycle researches potential host sites, communicates its mission to the potential host, and negotiates an agreement with them. *Id.* ¶16. The bins are visited approximately two to three times a week for service and maintenance. *Id.* ¶17.

On March 27, 2012, Oakland's Community and Economic Development Committee held a meeting to discuss the regulation of UDCBs. Schilt Decl., Exh. C [Dkt. No. 25-3].[1] During the meeting, the three coun-

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[1] Recycle's requests for judicial notice of the documents listed in Dkt. No. 25 are GRANTED.

cil members in attendance heard from representatives of non-profits such as Goodwill Industries and St. Vincent de Paul. *Id*. Approximately two years later, on April 1, 2014, the Oakland Redevelopment Successor Agency and the Oakland City Council held a concurrent meeting to further consider options for regulating UDCBs. Schilt Decl., Exh. D [Dkt. No. 25-4]. Many issues were discussed during the meeting including the possibility of a total ban, the appropriate permit fee amount, potential enforcement mechanisms, and proposals for ways in which more donations could be directed towards Goodwill and St. Vincent de Paul, thereby lessening the blight and maintenance issues caused by poorly maintained UDCBs. *Id*.

On April 22, 2014, the Oakland City Council placed a 45-day moratorium on new placements of UDCBs, which was extended at subsequent city council meetings. Comp. ¶23. The Ordinance was approved for final passage on October 20, 2015. Schilt Decl., Exh. A [Dkt. No. 25-1]. The Ordinance adds chapter 5.19 to the Oakland Municipal Code "which will regulate the placement, appearance, operation, and maintenance of UDCBs." *Id*. The "sole purpose" of the Ordinance is to "promote the public health, safety and/or welfare" associated with UDCBs in a "content neutral manner, based upon reasonable time, place and manner restrictions" that does not discriminate against any particular viewpoint, content, or UDCB operator. *Id*.

Municipal chapter 5.19, enacted by the Ordinance, makes it unlawful to operate a UDCB unless the operator first obtains a permit or is exempted from the permit requirements. Schilt Decl., Exh. B [Dkt. No. 25-2]. The permit application process in-

cludes paying a $535 fee for each UDCB, filing out an application form, providing a site plan to the city, and submitting proof of liability insurance. *Id.*; Duus Decl. ¶26 [Dkt. No. 24]. Additionally, there are annual renewal payments totaling approximately $245. Duus Decl. ¶26. UDCBs that are on the same lot or enclosed within an occupied principal building on property owned or leased by the UDCB operator are not required to submit a permit application. Schilt Decl., Exh. B. The regulations designate only certain areas of the city as available for UDCB placements and create a 1,000 foot exclusionary zone between bins. *Id.* The regulation also governs the physical attributes and maintenance of UDCBs. *Id.*

Recycle has maintained UDCBs in Oakland since 2005 and currently has 63 bins in different locations. Comp. ¶22. For various reasons, Recycle loses approximately 20% of its site hosts in a given year. Duus Decl. ¶16. The revenue generated by its bins is "by far" the major source of Recycle's income. Comp. ¶18. Recycle alleges that the Ordinance will eliminate approximately 90% of its UDCBs in Oakland, which will force the organization to reduce funding to charitable programs by approximately $57,000. Duus Decl. ¶¶24, 25. The application fee is also burdensome to Recycle. *Id.* ¶28. Under the current regulatory scheme, Recycle is considering ending its operations in Oakland. *Id.* ¶¶30, 31.

Recycle brings four causes of action against Oakland: (1) violation of the Free Speech Clause of the First Amendment of the United States Constitution; (2) violation of Article 1, Section 2 of the California Constitution; (3) violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and (4) violation of Article 1,

Section 7 of the California Constitution. On December 2, 2015 Recycle filed a motion for preliminary injunction seeking "an injunction staying enforcement of the regulatory scheme until such time as the constitutionality of the regulatory scheme can be fully adjudicated." Mot. at 17 [Dkt. No. 23].

LEGAL STANDARD

The same legal standard applies to a motion for a temporary restraining order and a motion for a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001). A plaintiff seeking either remedy "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (internal citations removed). Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

To grant preliminary injunctive relief, a court must find that "a certain threshold showing is made on each factor." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). Provided that this has occurred, in balancing the four factors, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

DISCUSSION

In its motion for preliminary injunction, Recycle asserts that: (1) it is likely to succeed on the merits of its First and Fourteenth Amendment claims; (2) it is likely to suffer irreparable harm absent an injunction; (3) the balance of the equities tips in its favor; and (4) an injunction would be in the public interest.[2]

I. LIKELIHOOD OF SUCCESS ON THE MERITS

A. First Amendment Claim

Recycle contends that the Ordinance violates its First Amendment right to solicit charitable donations, thereby violating its rights to free speech. Mot. at 14. The First Amendment's free speech clause provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Supreme Court has established that charitable donations qualify as a form of constitutionally protected speech. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633 (1980); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959 (1984). Neither party disputes this. Mot. at 16; Opp. at 8 [Dkt. No. 28]. The disagreement lies over whether the Ordinance can survive the appropriate level of scrutiny.

Recycle contends that because the Ordinance seeks to regulate only containers that solicit dona-

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[2] Although Recycle's complaint is based on violations of both the federal and California constitutions, Recycle's motion for preliminary injunction focuses only on its First and Fourteenth Amendment violations and presents no argument why the analysis under its California constitution claims would lead to a different outcome.

tions of recyclable material, it should be considered a content-based restriction subject to strict scrutiny. Mot. at 1. In opposition, Oakland asserts that the Ordinance is a reasonable regulation governing the time, place, and manner of speech and, as such, does not violate Recycle's First Amendment rights. Opp. at 7. Alternatively, Oakland contends that even if the Ordinance is deemed a content-based restriction, it remains a valid regulation. *Id*. at 18.

Generally, a content-based regulation on protected speech "can stand only if it satisfies strict scrutiny." *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 813 (2000). If a court applies strict scrutiny, the regulation "must be narrowly tailored to promote a compelling Government interest" and must use the least restrictive means to achieve its ends. *Id*. "A regulation is content-based if either the underlying purpose of the regulation is to suppress particular ideas, or if the regulation, by its very terms, singles out particular content for differential treatment." *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009); *see also Planet Aid v. City of St. Johns, MI*, 782 F.3d 318, 326 (6th Cir. 2015) ("*St. Johns*") ("[I]f a law treats speech differently based on the viewpoint or subject matter of the speech, on the words the speech contains, or on the facts it conveys, the law is based on the content (and the communicative impact) of speech.") (internal quotation marks, citations, and modifications omitted).

Recycle relies primarily on *St. Johns* to argue that because the Sixth Circuit affirmed the district court's finding that the city's ordinance was content-based and subject to strict scrutiny, the same analysis applies here. In *St. Johns*, the City of St. Johns passed an ordinance prohibiting the placement or

use of a "donation box" within the city. *Id.* at 322. One of the critical questions before the *St. Johns* court was whether the regulation was content-based since the content status of a regulation dictates the level of scrutiny applied to it. *Id.* at 326. Determining whether a particular regulation is content-based is "not always a simple task." *Id.* The court concluded that because the ordinance did not ban or regulate all unattended, outdoor receptacles, but instead banned only "those unattended, outdoor receptacles with an expressive message on a particular topic—charitable solicitation and giving," it was content-based and subject to strict scrutiny. *Id.* at 328. Key to *St. Johns'* determination was that the ordinance did not reflect that concerns regarding the effects of UDCBs—blight, child safety, potential for criminal loitering—were also applicable to other unattended, outdoor receptacles such as dumpsters, recycling center collection bins, and public and private trash cans. *Id.* St. Johns' ordinance permitted the placement and use of non-expressive bins but completely banned UDCBs. *Id.* Therefore, the court concluded the regulations targeted UDCBs and were not intended to address the secondary effects of unattended bins. *Id.*

Here, because the Ordinance does not prohibit UDCBs, does not implement content-based restrictions, and is viewpoint neutral, the application of strict scrutiny is not appropriate. Oakland's regulatory structure is not analogous to the ordinance in *St. Johns*. To begin with, the Ordinance does not totally ban UDCBs. Instead, it regulates the placement, maintenance, and physical characteristics of UDCBs irrespective of their message or affiliated organization. It does not permit the installation and

use of non-expressive bins while banning the use of UDCBs.

In preparation for drafting the Ordinance, Oakland's Department of Planning and Building staff prepared reports and draft ordinances for consideration by the City Council. Miller Decl., Exh. B [Dkt. No. 29]. Among other things, the reports describe Oakland's regulations for recycling collection center bins, detached accessory structures, and trash and recycling receptacles. *Id*. The reports detail that concerns for graffiti, blight, and public safety differ among the various receptacles and advocate for a separate set of regulations to address UDCB's particularized secondary effects. *Id*. These reports reflect some of the specific UDCB-related concerns discussed at the City Council meetings as well. This evidence supports Oakland's argument that the "predominant" intent of the Ordinance is to enact a content-neutral way to regulate UDCBs. *City of Renton v. Playtime Theatres, Inc*., 475 U.S. 41, 47-48 (1986) (finding that the ordinance's predominate intent was to address the secondary effects of adult theaters because "by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and … not to suppress the expression of unpopular views").

The Ordinance also does not discriminate on the basis of viewpoint. The regulations do not require that an official review the expressive components of a UDCB to determine whether it is subject to enforcement. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."); *City of Renton*, 475 U.S. at 48

(defining content-neutral regulations as those that "are justified without reference to the content of the regulated speech."). It applies equally to UDCBs maintained by charitable non-profits such as Recycle or for profit organizations. Recycle's argument that the Ordinance is viewpoint-based because it exempts some brick and mortar stores from certain requirements is unconvincing. Reply at 8 [Dkt. No. 31]. The Ordinance distinguishes on the basis of geographic properties, not on viewpoint. If Recycle were to open its own physical location in Oakland, there is nothing preventing it from taking advantage of these same benefits.

When considered in the broader context of outdoor bin regulations, Oakland's UDCB standards are more akin to those at issue in *Planet Aid v. Ypsilanti Township*, 26 F. Supp. 3d 683 (E.D. Mich. 2014) ("*Ypsilanti*"). *Ypsilanti* concerned an ordinance that regulated all "accessory structures installed by property owners," including donation bins. 26 F. Supp. 3d at 686. The court concluded that the zoning ordinance was content neutral because it subjected all accessory structures to the ordinance. *Id*. at 689. Similarly, in Oakland, UDCBs are not the only unattended bins subject to regulation. That in *Ypsilanti* all bins were subject to the same regulations, whereas Oakland's regulations distinguish between UDCBs and other unattended, outdoor bins, does not convert Oakland's regulations to content-based restrictions. Additionally, unlike the regulation at issue in *St. Johns*, the Ordinance does not constitute a complete ban on UDCBs. There is no dispute that UDCBs will continue to be allowed in Oakland following the Ordinance's implementation. Therefore, as in *Ypsilanti*, strict scrutiny is not mandated. 26 F. Supp. 3d at 688 ("The Court is unpersuaded that the

strict scrutiny standard should be applied to determine the constitutionality of the Defendant's zoning ordinance because the Plaintiff has not cited any language in the Defendant's zoning ordinance that places a total ban on all donation bins.").

Oakland argues that the regulation should be subject to a reasonable time, place, and manner analysis. Opp. at 7. "[T]he fact that a government regulation may incidentally impact some protected speech does not automatically trigger strict scrutiny." *St. Johns*, 782 F.3d at 326. "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks and citations omitted).

Although Recycle acknowledges that so long as the Ordinance does not unduly burden speech, Oakland may implement and enforce a reasonable regulatory scheme, it does not argue that the Ordinance fails an intermediate level of scrutiny. Reply at 5. Recycle contends that because less restrictive alternatives exist, Oakland must use those alternatives. Opp. at 4. But under an intermediate scrutiny analysis, "the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effec-

tively absent the regulation." *Ward*, 491 U.S. at 799 (internal quotation marks, citations, and modifications omitted). It need not be the least restrictive or intrusive means of doing so. *Id*. at 798.

"[I]t is well-settled that the state may legitimately exercise its police powers to advance esthetic values." *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). Oakland asserts that it has a significant government interest in addressing the impacts of poorly maintained UDCBs including illegal dumping, scavenging, graffiti, and traffic safety. The Supreme Court has squarely held that a city's concerns regarding traffic safety and its appearance are "substantial governmental goals." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals."). Considering that the Ordinance addresses these concerns by regulating the size, maintenance, and location of UDCBs, Recycle has raised no serious question that the Ordinance is not sufficiently narrowly tailored to Oakland's goals to survive intermediate scrutiny.

Recycle also contends that the permit application fee is "extremely burdensome" to its organization. Mot. at 12. The initial application and renewal fees, $535.31 and $245.71, respectively, are based on the city's "cost structure, and estimated time required for City staff to complete processing of the application, and site inspections." Opp. at 4 n.4. Oakland asserts that its staff conducted a fee analysis study to determine an appropriate basis for fees so that the fee did not exceed the reasonable cost of providing the

service of processing the application and was within the range of what other cities charge for similar services. Miller Decl. ¶11.[3] Municipalities are not required to charge only nominal fees for their services. *See Am. Target Advert., Inc. v. Giani*, 199 F.3d 1241, 1248 (10th Cir. 2000); *Kwong v. Bloomberg*, 723 F.3d 160, 166 n.11 (2d Cir. 2013). Because Recycle has provided no evidence that the fee "does no more than defray reasonable administration costs," it has not raised any serious issues regarding this aspect of the analysis. *Am. Target Advert.*, 199 F.3d at 1248.

Additionally, alternative avenues of communication for Recycle remain. The Ordinance does not restrict Recycle's ability to solicit charitable donations in a manner unrelated to UDCBs.

In sum, intermediate scrutiny applies to the Ordinance, which is a reasonable time, place and manner regulation. It is not likely that Recycle will prevail on the merits of its challenges to the Ordinance

B. Fourteenth Amendment Claim

Recycle argues that because the Ordinance uses classifications to create an "exception" for certain organizations and "singles out" donation bins for regulation, the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment. Mot. at 16. The Ordinance exempts UDCBs located on owner-owned or leased parcels from the application requirement and certain geographical restrictions. Duus Decl., Exh. B. Oakland defends this carve out

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[3] In its analysis, Oakland looked at what eight other California jurisdictions charge for UDCB permits and found that the initial application fee ranged from $132 to $3,742. Miller Decl. ¶11 n.2.

on the basis that such UDCBs can be "easily monitored on a daily basis" by the operator, supporting its goals to limit the blight caused by poorly maintained UDCBs. Opp. at 22.

The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (internal citations and quotation marks omitted). "[T]he Constitution neither knows nor tolerates classes among citizens." *Romer v. Evans*, 517 U.S. 620, 623 (1996) (internal quotation marks and citations omitted). However, "[t]he Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Id.* at 631.

Recycle has not identified, and I do not find, that the Ordinance discriminates on the basis of a suspect class. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277 (9th Cir. 2004) ("Strict scrutiny is applied when the classification is made on 'suspect' grounds such as race, ancestry, alienage, or categorizations impinging upon fundamental rights such as privacy, marriage, voting, travel, and freedom of association. Laws are subject to intermediate scrutiny when they discriminate based on certain other suspect classifications, such as gender.") (internal citations omitted); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1481 (6th Cir. 1995) ("[T]he distinction between large and small charities

does not implicate a suspect class."). Therefore, the Ordinance is subject to rational basis review. *Romer*, 517 U.S. at 631 ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

Under rational basis review, the classification must be "narrow enough in scope and grounded in sufficient factual context for [courts] to ascertain some relation between the classification and the purpose it serve[s]." *Romer*, 517 U.S. at 632-33. The rational basis inquiry "employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976). In defending a statute on rational basis review, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Kahawaiolaa*, 386 F.3d at 1280 (internal quotation marks, citations, and modifications omitted).

Here, the Ordinance's "classifications" are rationally related to Oakland's concerns regarding maintaining the city's esthetics and pedestrian and traffic safety. When an owner operates a related business on the same locale as the UDCB, the bins can be easily monitored. This supports Oakland's goals of diminishing the blight caused by poorly maintained bins. Similarly, Oakland's Department of Planning and Building's reports presented multiple ways in which the effects of different outdoor bins vary and why a separate set of regulations was need-

ed for UDCBs. Recycle does not offer any arguments addressing why these justifications are not rationally related to Oakland's regulatory purposes.[4]

Oakland's proffered explanations for the differing treatment of UDCBs are sufficient to withstand rational basis review. Recycle has not demonstrated a likelihood of success on the merits, or raised any serious issues, on this claim.

II. IRREPARABLE HARM

"To obtain injunctive relief, the movant must demonstrate either: (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised as to the merits and that the balance of hardships tips in its favor." *Dep't of Parks & Recreation for State of California v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1123 (9th Cir. 2006). Here, as discussed above, Recycle has shown neither probable success on the merits nor serious questions going to the merits. Where the plaintiff is unable to establish the first requirement, the court need not review the other factors, and the request for a preliminary injunction should be denied. *See Dep't of Parks & Recreation for State of California*, 448 F.3d at 1124; *see also Valentino v. Select Portfolio Servicing, Inc.*, No. 14-cv-05043-JCS, 2015 WL 1906122, at *5 (N.D. Cal. Apr. 24, 2015) (denying request for preliminary injunction based only on movant's failure to establish likelihood of success of serious questions going to the merits).

But even if Recycle had met the first requirement for a preliminary injunction, it still has not

[4] Notably, Recycle's Reply does not address its Fourteenth Amendment claim at all.

demonstrated that it will suffer irreparable injury absent an injunction. "Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). "[E]conomic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award." *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). The mere "possibility" of irreparable harm is not enough to justify a preliminary injunction. "A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original).

Recycle argues that it is likely to suffer irreparable harm due to that fact that it is "facing the loss of approximately 90[%] of its UDCBs in Oakland." Mot at 17. However, the true extent of the impact of the Ordinance on Recycle is currently undetermined. *Compare* Miller Decl. ¶3 (Oakland estimates that 137 UDCBs could be placed in the city after the Ordinance goes into effect, which would result in a decrease of only 15 UDCBs and preserve more than 90% of the existing UDCBs) *with* Duus Decl. ¶24 (Recycle estimates the regulations will eliminate 90% of its UDCBs in Oakland). Recycle has not yet applied for permits or been rejected. It is possible that fewer of its UDCBs will ultimately be affected or that competing bins will not be permitted, allowing Recycle to expand to unexpected areas.

Additionally, Recycle asserts that the permit fee is "extremely burdensome" to the organization. Duus

Decl. ¶28. But the payment of fees is not an irreparable injury as Recycle maintains an adequate remedy at law in the form of damages.

Recycle is also concerned about the potential damage to its goodwill and the ongoing relationships it has within the community. Opp. at 16. "Loss of goodwill is an injury that can be considered irreparable, and thus may support injunctive relief." *Amylin Pharm., Inc. v. Eli Lilly & Co.*, 456 F. App'x 676, 678 (9th Cir. 2011). However, beyond conclusory statements that the "imminent enforcement of the [O]rdinance will terminate those relationships" it has not offered any specific evidence demonstrating its reputation in the community or the nature of the damage to its relationships. Opp. at 16. Without more, Recycle has failed to show irreparable injury due to loss of goodwill. *See Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (affirming the district court's denial of a preliminary injunction on the grounds that plaintiff failed to provide sufficient evidence of loss of reputation, competitiveness, and goodwill.); *see also Dotster, Inc. v. Internet Corp. For Assigned Names & Numbers*, 296 F. Supp. 2d 1159, 1163-64 (C.D. Cal. 2003) ("Although the loss of goodwill and reputation are important considerations in determining the existence of irreparable injury, there must be credible and admissible evidence" of the damage.).

Lastly, while "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Recycle has not demonstrated that its First Amendment rights are being violated by the Ordinance. *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474,

1480 (6th Cir. 1995) (internal quotation marks, citations and modifications omitted).

In light of the above considerations, Recycle has failed to establish immediate and irreparable harm.

CONCLUSION

Because Recycle has not established either a serious question going to the merits or irreparable harm, it is not entitled to a preliminary injunction. Recycle's motion is DENIED. The parties shall meet and confer prior to the Case Management Conference on February 2, 2016 regarding a proposed trial and pre-trial schedule.

IT IS SO ORDERED.

APPENDIX C

City of Oakland Ordinance No. 13335 C.M.S.

Chapter 5.19 – UNATTENDED DONATION/ COLLECTION BOXES

October 20, 2015

Sections:

Article I – General Provisions

5.19.010 – Purpose.

The purpose of these regulations is to promote the health, safety, and/or welfare of the public by providing minimum blight-related performance standards for the operation of unattended donation/collection boxes (UDCBs). This includes establishing criteria to ensure that material is not allowed to accumulate outside of the UDCBs, the UDCBs remain free of graffiti and blight, UDCBs are maintained in sanitary conditions, and residents and/or users are fully informed of those who operate the UDCBs so that they can be contacted if there are any blight-related questions or concerns.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.020 – Conflicting provisions.

Where a conflict exists between the regulations or requirements in this chapter and applicable regu-

lations or requirements contained in other chapters of the OMC, the applicable regulations or requirements of this chapter shall prevail.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.030 – Violation.

Failure to comply with any of the provisions of this chapter is declared to be prima facie evidence of an existing violation, a continuing blight and a declared public nuisance and shall be abated by the Director in accordance with the provisions of this chapter. Any person in violation will be subject to administrative penalties, citations, civil action and/or other legal remedies.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.040 – Responsibility.

The parcel owner and the UDCB operator (operator) have joint and several liability for blight-related conditions and/or compliance with this chapter, including fees, administrative citations, civil actions, and/or legal remedies relating to a UDCB. The parcel owner remains liable for any violation of duties imposed by this chapter even if the parcel owner has, by agreement, imposed on the operator the duty of complying with the provisions of this chapter.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.050 – Definitions.

"Accessory activity" means an activity that is incidental to, and customarily associated with, a specified principal activity.

"Agent" means a person who is authorized by the parcel owner to act on their behalf to be the applicant for a UDCB permit. To be considered an agent, a person must be given express written authorization from the parcel owner on a form provided by the City to apply specifically for a UDCB permit. For the purpose of this chapter, a person who is only given general authorization to act on the behalf of a parcel owner for various activities and transactions in regards to a property is not considered an agent.

"Blight" or "nuisance" means the conditions as set forth in Oakland Municipal Code Section 8.24.020.

"Building Official" means the Director of the Bureau of Building and his or her successor in title and his or her designees.

"Bureau of Building" and "Bureau of Planning" includes their successors in title, if any.

"Director" means the Director of the Bureau of Planning and Building and his or her successor in title and his or her designees.

"Donated/collected material" means salvageable personal property, such as clothing and books and household items that is collected for periodic transport off-site for processing or redistribution or both.

"Parcel owner" or "property owner" means the owner of real property on which a UDCB is or is proposed to be placed.

"Principal activity" means an activity that fulfills a primary function of an establishment, institution, household, or other entity.

"Principal building" means a main building that is occupied a principal activity.

"UDCB operator" or "operator" means a person or entity who utilizes or maintains a UDCB to solicit donations/collections of salvageable personal property.

"UDCB permit" means the City of Oakland's annually renewable permit required to place, operate, maintain, or allow a UDCB within the Oakland City limits.

"Unattended donation/collection boxes" or "UDCBs" means unstaffed drop-off boxes, containers, receptacles, or similar facility that accept textiles, shoes, books and/or other salvageable personal property items to be used by the operator for distribution, resale, or recycling.

"Unpermitted UDCB" means a UDCB established either without a UDCB permit or with a UDCB permit that was issued in error or on the basis of incorrect or incomplete information supplied, or in violation of any law, ordinance, rule, or regulation.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

Article II – UDCB Permit Requirement and Process

5.19.060 – Permit required for UDCBs.

A. With the exception of UDCBs described in Subsection B, below, it is unlawful to place, operate, maintain or allow a UDCB on any real property unless the parcel owner/agent and/or operator first obtain an annually renewable UDCB permit from the City. A separate UDCB permit is

required for each UDCB unless a second UDCB is required for overflow items per Subsection 5.19.120(H), in which case the permit for the first UDCB can include the second UDCB on a parcel.

B. UDCBs that are either enclosed within a principal building or are accessory to a principal activity on a property owned or leased by the bin operator shall not require a UDCB permit. However, UDCBs that are accessory to a principal activity on a property owned or leased by the bin operator shall meet all other requirements of this chapter except the requirements contained in Subsection 5.19.120(A), (B) and/or (C).

C. The UDCB permit applicant shall be the UDCB operator and the permit may not be transferred, conveyed or otherwise assigned to another person or entity.

D. Decisions regarding UDCB permit applications shall be made by the Director and the Director shall be considered the investigating official acting for the City Administrator.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.070 - Application requirements.

The UDCB permit application shall be made on a form provided by the Bureau of Planning and Zoning. All applications shall be filed with the Bureau of Planning and Zoning and shall include:

A. A signed agreement stating that the parcel owner/agent and operator will abide by all the processes and requirements described in this

chapter and an expedited code enforcement process;

B. A non-refundable application fee in an amount set by the master fee schedule;

C. For permit applications for existing UDCBs, a signed affidavit, under penalty of perjury, stating that the UDCB existed at the proposed location prior to the adoption of Ordinance No. 13225 C.M.S. on April 22, 2014;

D. A signed authorization from the parcel owner/agent to allow placement of the UDCB;

E. A signed acknowledgement of responsibility from the parcel owner/agent and the operator for joint and several liability for violations of conditions or regulations, and/or blight relating to the UDCB;

F. Proof of general liability insurance of at least $1,000,000.00 covering the applicant's UDCB and naming the City of Oakland as an additional insured;

G. For nonprofit operators, evidence that the nonprofit has been registered as a non-profit organization with the City of Oakland, is recognized by the Internal Revenue Service as such, and complies with California Welfare and Institutions Code Section 148 et seq. as it may be amended;

H. For for-profit operators, proof of an active business tax certificate with the City of Oakland;

I. The name, address, email, website (if available) and telephone number of the UDCB operator and parcel owner, including 24-hour contact information;

J. A vicinity map showing 1) the proposed location of the UDCB; and 2) the distance between the site and all existing UDCBs within 1,000 feet of the proposed UDCB location;

K. Photographs of the location and adjacent properties;

L. A site plan containing:

1. Location and dimensions of all parcel boundaries;
2. Location of all buildings;
3. Proposed UDCB location;
4. Distance between the proposed UDCB and parcel lines buildings; and
5. Location and dimension of all existing and proposed driveways, garages, carports, parking spaces, maneuvering aisles, pavement and striping/marking;

M. Elevations showing the appearance, materials, and dimensions of the UDCB, including the information required in this chapter to be placed on the UDCB and notice sign;

N. A description and/or diagram of the proposed locking mechanism of the UDCB;

O. A maintenance plan (including graffiti removal, pick-up schedule, and litter and trash removal on and around the UDCB) that is sufficient to prevent/eliminate blight-related conditions; and

P. Any other reasonable information regarding time, place, and manner of UDB operation, placement, and/or maintenance that the Direc-

tor requires to evaluate the proposal consistent with the requirements of this chapter.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.080 – UDCB permit expiration and renewal.

A. Unless renewed as described in Subsection B, below, each UDCB permit shall expire and become null and void annually on the anniversary of its date of issuance.

B. A UDCB operator may apply for permit renewal by submitting to the Bureau of Planning at least one month prior to the expiration of the active UDCB permit. The UDCB permit renewal application shall be made on a form provided by the Bureau of Planning and Zoning. All applications shall be filed with the Bureau of Planning and Zoning and shall include:

   1. A signed agreement stating that the parcel owner/agent and operator will abide by all the processes and requirements described in this chapter and an expedited code enforcement process;

   2. Photographs of the existing UDCB;

   3. A non-refundable application fee in an amount set by the master fee schedule;

   4. A signed authorization from the parcel owner/agent to allow placement of the UDCB;

   5. A signed acknowledgement of responsibility from the parcel owner/agent and the operator for joint and several liability for violations of conditions or regulations, and/or blight relating to the UDCB;

6. Proof of general liability insurance of at least $1,000,000.00 covering the applicant's UDCB and naming the City of Oakland as an additional insured;

7. For nonprofit operators, evidence that the nonprofit has been registered as a non-profit organization with the City of Oakland, is recognized by the Internal Revenue Service as such, and complies with California Welfare and Institutions Code Section 148 et seq. as it may be amended;

8. For for-profit operators, proof of an active business tax certificate with the City of Oakland;

9. Name and telephone number of any entity that may share or profit from items collected via the UDCB;

10. The name, address, email, website (if available) and telephone number of the UDCB operator and parcel owner, including 24-hour contact information; and

11. Any other reasonable information regarding time, place, and manner of UDB operation, placement, and/or maintenance that the Director requires to evaluate the proposal consistent with the requirements of this chapter.

C. The Director shall either approve or deny the renewal of a UDCB permit within 60 days of receipt of the complete renewal application and payment of the renewal fee. The failure of the Bureau of Planning to act within this timeframe

shall constitute approval of the UDCB permit renewal.

D. The Director shall approve the renewal of a UDCB permit if he or she finds that no circumstances existed during the term of the UDCB permit or existed at any time during the review of the application for renewal that are inconsistent with any criteria required for approval of a new UDCB permit as specified in Section 5.19.090 or that would justify the revocation of the UDCB permit as specified in Subsection 5.19.170(G).

E. See Section 5.19.110 for the appeal and petition processes for UDCB permit decisions, including decisions regarding renewal.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.090 – Requirements for the approval and renewal of a UDCB permit.

The Director shall not issue a UDCB permit or renewal unless each of the following is true:

A. The applicant has submitted a complete and accurate application accompanied by the applicable fee;

B. There are no open citations, unpaid fines or unresolved violations or complaints related to any UDCB managed by the proposed operator;

C. All existing unpermitted UDCBs that are managed by the proposed operator have been removed;

D. Reserved.

E. Any verified blight on the subject property has been abated and any case of a complaint to the City regarding blighted conditions on the subject property has been closed; and

F. The proposal is consistent with all the requirements of this chapter.

G. For renewals, the site does not have a history of being an attractive nuisance even if incidents of blight were abated. For the purpose of this subsection, "history of attractive nuisance" means three verified blight complaints in the previous 12 months.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.100 – Time limit for final decision.

The Director shall provide a written decision regarding the placement of a UDCB within 60 days of the submission of a complete application for a UDCB permit.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.110 – Appeal and petition processes.

A. Within ten calendar days after the date of a decision by the Director on an application for a UDCB permit or a renewal of such, an appeal from said decision must be filed by the applicant or any other interested party. The appeal shall be submitted to the Bureau of Planning at 250 Frank H. Ogawa Plaza, 2nd Floor, Oakland, CA 94612. In the event the last date of appeal falls on a weekend or holiday when City offices are closed, the next date such offices are open for business shall be the last date of appeal. Such

appeal shall be made on a form prescribed by the Bureau of Planning and shall be filed with such Department, along with the appropriate fees required by the City's master fee schedule. The appeal application must be complete and shall state specifically wherein it is claimed there was an error or abuse of discretion by the Director or wherein his or her decision is not supported by the evidence in the record. The appeal itself must raise each and every issue that is contested, along with all the arguments and evidence in the record, which supports the basis of the appeal; failure to do so will preclude the appellant from raising such issues during the appeal and/or in court.

If a hearing is held on the appeal, then during such hearing, the appellant will be limited to issues and/or evidence previously raised in the appeal itself. The appellant shall not be permitted to present any other issues and/or oral, written and/or documentary evidence during the appeal process.

In considering the appeal, the City Administrator shall determine whether the proposal conforms to the requirements of this chapter, and may grant or deny a permit or require such changes in the proposed use or impose such reasonable conditions of approval as are in its judgment necessary to ensure conformity to said criteria. The written decision of the City Administrator shall be final and shall be made within 60 days of the submission of the appeal.

B. The applicant seeking placement of a UDCB which would be affected by this chapter and who contends that the ordinance as applied to him or

her would be unlawful under and/or conflict with federal, state, or local law or regulation, must submit a petition to the City Administrator requesting relief from the ordinance. Petitions must be on the appeal form provided by the Bureau of the Planning and submitted to the Bureau at 250 Frank H. Ogawa Plaza, Suite 2114. Failure to submit such a petition will preclude such person from challenging the ordinance as applied in court. The Petition shall identify the name and address of the applicant and property owner, the affected application number, and shall state specifically and completely how the ordinance as applied to him or her would be unlawful under and/or in conflict with federal, state, or local law or regulation, and shall include payment of fees in accordance with the City's master fee schedule. Failure to raise each and every issue that is contested in the petition and provide appropriate supporting evidence will be grounds to deny the petition and will also preclude the petitioner from raising such issues in court.

If a hearing is held on the petition, then during such hearing, the petitioner will be limited to issues and/or evidence previously raised in the petition itself. The petitioner shall not be permitted to present any other issues and/or oral, written and/or documentary evidence during the petition process.

Within 60 calendar days of receipt of the completed petition, the City Administrator, or designee, shall mail to the applicant a written determination accepting or rejecting the petition. The written decision of the City Administrator is

final. The City Administrator will utilize reasonable time, place and manner criteria to determine if the petition should be granted or denied consistent with this chapter. If the petition is granted, the City may impose reasonable time, place and manner-related conditions on the UDCB consistent with this chapter.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

Article III – Standards and Requirements

5.19.120 – Location.

A. No UDCB shall be located within 1,000 feet from any other UDCB, except those described in Subsection 5.19.060(B).

B. With the exception of areas described in Subsection (C), below, UDCBs are only allowed to be located in the following zones, which are designated in the zoning maps described in Chapter 17 of the Oakland Municipal Code:

1. CC-1 and CC-2;
2. CN-4;
3. CR-1;
4. D-BV-2 and D-BV-3;
5. C-40 and C-45;
6. S-1 and S-2;
7. D-KP-1, D-KP-2, and D-KP-3;
8. D-CE-1, D-CE-2, D-CE-4, D-CE-5, and D-CE-6;
9. D-BV-1, D-BV-3, and D-BV-4; or

10. All industrial zones.

C. No UDCBs are permitted within 300 feet of International Boulevard.

D. A UDCB is only permitted on a lot that also contains a principal building that contains at least one operating business, occupied residential unit, or other ongoing activity, not including a surface auto fee parking commercial activity as defined in Chapter 17.10 of the Oakland Municipal Code.

E. UDCBs are prohibited within any of the following locations:

1. Fifteen feet from lots that lie in a hillside residential, detached unit residential, or mixed housing type residential zone as designated in the City's zoning maps;
2. The public right-of-way and 20 feet of the public right-of-way;
3. Five feet from any property line; or
4. Landscaping.

F. UDCBs cannot block or impede access to:

1. Required parking or driveways;
2. Pedestrian routes;
3. Emergency vehicle routes;
4. Building ingress and egress;
5. Required handicapped accessibility routes;
6. Required easements; or
7. Trash enclosure areas or access to trash bins/trash enclosures.

G. UDCBs cannot impede the functioning of exhaust, ventilation, or fire extinguishing systems.

H. No more than one UDCB is permitted per parcel unless documented evidence is submitted to the Director that a second bin is required due to the volume of items delivered to the site. A UDCB must be operating at a site for at least 90 days in order to establish that a second bin is required. Both UDCBs shall have the same operator. No fee is required to submit an application for this second bin.

I. The donation/collection area must be visible from the principal building and be no more than ten feet from a continually operating light source of at least one foot candle.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.130 – Physical attributes.

A. UDCBs shall:

1. Be fabricated of durable and waterproof materials;
2. Be placed on ground that is paved with durable cement;
3. Have a collection opening that has a tamper-resistant locking mechanism;
4. Be more than 82 inches high, 60 inches wide and 50 inches deep;
5. Not be electrically or hydraulically powered or otherwise mechanized;

6. Not be a fixture of the site or considered an improvement to real property; and
7. Have the following information conspicuously displayed on at least two-inch type visible from the front on the UDCB:
   i. The name, address, 24-hour telephone number, and, if available, the Internet Web address, and email address of the owner and operator of the UDCB and the parcel owner/owner agent;
   ii. Address and parcel number of the site;
   iii. Instructions on the process to register a complaint regarding the UDCB to the City Code Enforcement Division;
   iv. The type of material that may be deposited;
   v. A notice stating that no material shall be left outside the UDCB;
   vi. The pickup schedule for the UDCB;
   vii. A City approved identification system that identifies the box as being properly permitted by the City;
   viii. If the UDCB is owned by a nonprofit organization:
      a. A statement describing the charitable cause that will benefit from the donations;
      b. The Federal Tax identification number of the nonprofit organization operating the UDCB; and

c. The statement "This collection box is owned and operated by a nonprofit organization."

ix. If the UDCB is owned by a for-profit entity:

a. "This donation is not tax deductible." and

b. "This collection box is owned and operated by a for-profit organization."

B. The parcel containing the UDCB shall display a sign with text in at least two-inch typeface stating that no material shall be left outside the UDCB. This sign shall be installed at a visually conspicuous location within a radius of 20 feet from the UDCB.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.140 – Maintenance.

A. No blight shall be within 20 feet of the UDCB including, but not limited to donation/collection overflow, litter, debris, and dumped material.

B. UDCBs shall be maintained and in good working order. Items to be repaired, removed, and/or abated include, but are not limited to graffiti, removed or damaged signs and notifications, peeling paint, rust, and broken collection operating mechanisms.

C. UDCBs shall be serviced not less than weekly between 7:00 a.m. and 7:00 p.m. on weekdays and 10:00 a.m. and 6:00 p.m. on weekends. This servicing includes the removal of donat-

ed/collected material and abatement of the blight described this section.

D. The operator shall maintain an active email address and a 24-hour telephone service with recording capability for the public to register complaints.

E. UDCBs cannot be used for the collection of solid waste and/or any hazardous materials.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.150 – Liability.

Applicants and/or owner/owners agent shall maintain a minimum general liability insurance of $1,000,000.00 for the duration of the operation of a UDCB at each site, to cover any claims or losses due to the placement, operation, or maintenance of the UDCB and naming the City of Oakland as additional insured.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.160 – AB 939 Reporting.

Permitted UDCB operators shall be required to report annually the tonnage collected from their UDCBs within the City, including a breakdown by material type, whether the materials were reused or recycled, and any other information needed by the City to comply with AB 939. This information must be available to the City within 60 days of the end of the calendar year. Failure to report will be grounds for revocation of the UDCB permit.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

Article IV – Code Enforcement

5.19.170 – Compliance process.

A. Whenever the Building Official determines that a UDCB with a valid permit does not conform to any requirement in this chapter he/she shall promptly notify the parcel owner/agent and UDCB operator through electronic mail of the violation. The violation must be abated and proof of such submitted to the City within 72 hours after receipt of such notification.

B. If an unpermitted UDCB is not within a permissible geographic area according to Section 5.19.120, then both the UDCB and any blight within 20 feet of the UDCB shall be removed within 72 hours after the parcel owner/agent and UDCB operator is notified of the violation.

C. If an unpermitted UDCB is within a permissible geographic area according to Section 5.19.120 then any blight within 20 feet of the site shall be removed and the parcel owner/agent and/or operator shall either: 1) apply for all UDCB permits required by this chapter; or 2) remove the UDCB. This requirement shall be met within 72 hours after the parcel owner/agent and/or UDCB operator are notified of the violation.

D. Each day that a violation of a requirement of this chapter is not abated constitutes a new and separate offense.

E. The operation or maintenance of an unpermitted UDCB may be abated or summarily abated by the City in any manner by this Code or otherwise by law for the abatement of public nuisances. Pursuant to Government Code Section

38773, all expenses incurred by the City in connection with any action to abate a public nuisance will be chargeable to the persons creating, causing, committing, or maintaining the public nuisance.

F. The City shall assess administration citations pursuant to O.M.C. Chapter 1.12 against a parcel owner and/or operator who fails to timely resolve a violation or verified compliance is not sent to the City showing the resolution of the violation relating to a UDCB after notice.

1. For permitted UDCBs, the City shall issue administrative citations pursuant to O.M.C. Chapter 1.12:

    a. Not more than $150.00 for the first citation after the 72-hour abatement period;

    b. Not more than $250.00 for the second citation after the 72-hour abatement period; and

    c. Not more than $500.00 for the third and each subsequent citation after the 72-hour abatement period. Total fines resulting from administrative citations shall not be more than $5,000.00 within one year for each cited UDCB.

2. For unpermitted UDCBs, the City shall issue administrative citations pursuant to O.M.C. Chapter 1.12:

    a. Not more than $750.00 for the first citation after the 72-hour abatement period;

b. Not more than $1,000.00 for the second citation after the 72-hour abatement period; and

c. Not more than $1,500.00 for the third and each subsequent citation after the 72-hour abatement period. Total fines resulting from administrative citations shall not be more than $10,000.00 within one year for each cited UDCB.

G. The daily administrative citations described in Subsection F shall continue until either the violation is abated or the UDCB is removed. Pursuant to Government Code Section 38773, removal of the UDCB shall be at the expense of the parcel owner and/or operator. Any UDCBs removed shall also have any of its UDCB permits revoked.

H. The property owner and operator are jointly and severally liable and responsible for all fees, administrative citations, and compliance with the regulations.

I. Administrative citations for unpermitted UDCBs may be appealed administratively pursuant to appeals of administrative actions set forth in the Oakland Municipal Code or as developed by the City Administrator. Administrative citations for permitted UDCBs are not appealable.

J. A party aggrieved by a final administrative decision of the City may seek judicial review of the administrative decision pursuant to California Code of Civil Procedure Sections 1094.5 and

1094.6 within the time frame pursuant to those code sections.

K. All notices for unpermitted UDCBs shall be in writing and personally delivered to the parcel owner/agent and UDCB operator or by depositing such notice in the United States mail, postage paid, and addressed to the parcel owner/agent at the owner(s) last known address as it appears on the last Alameda County equalized assessments roll, as well as placed on the UDCB itself. If the City cannot reasonably determine the name and/or address of the unpermitted UDCB operator, placing the written notice on the UDCB itself constitutes sufficient notice. All notices regarding permitted UDCBs shall be through electronic mail.

L. Administrative citations established in this chapter are in addition to any other administrative or legal remedy which may be pursued by the City to address violations identified in this chapter.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

5.19.180 – Private rights of action.

A. Any person claiming a violation of this chapter may bring an action in the Municipal Court or Superior Court of the State of California, as appropriate, to enforce the provisions of this chapter. Violations of this chapter are declared to irreparably harm the public.

B. The Court shall award reasonable attorney's fees, witness fees and costs to any plaintiff who prevails in an action to enforce this chapter.

C. No criminal penalties shall attach for any violation of this chapter.

D. No remedy set forth in this section is intended to be exclusive or a prerequisite for asserting a claim for relief to enforce any rights hereunder in a court of law.

E. Nothing in this chapter shall be interpreted to authorize a right of action against the City, nor shall this section give rise to any cause of action for damages against the City.

F. The property owner or owner's agent shall have the right to rescind consent for a UDCB to be placed on the property, provided written notice of the rescission is provided to the UDCB operator, as provided in their agreement but in no event less than ten business days prior to the UDCB being removed.

G. The property owner or owner's agent shall be held harmless by the UDCB operator for the removal of an unauthorized UDCB where removal is necessary to comply with this chapter.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)

Article V – Noticing Procedure for Removal

5.19.190 – Notice required for removal.

A. Any UDCB scheduled to be removed by either the City or the operator shall clearly display a notice on the UDCB with at least four-inch type visible from the front on the UDCB that states the following text in capital letters: "THIS BOX WILL BE REMOVED BY" followed by the date the UDCB is scheduled for removal. The opera-

tor and property owners are jointly and severally responsible for the placement of the notice.

B. For UDCBs required to be removed by the City of Oakland due to an abatement order, the notice shall be posted immediately after the City notifies the operator and/or parcel owner that the facility is required to be removed.

C. Notice that a UDCB will be removed by the owner or operator shall be posted at least 14 calendar days prior to the removal of the facility.

(Ord. No. 13335, § 2(Exh. A), 10-20-2015)