

No. 17-431

In The
Supreme Court of the United States

—◆—
RECYCLE FOR CHANGE,

Petitioner,

v.

CITY OF OAKLAND,
a California Municipal Corporation,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF FOR AMERICAN TEXTILE
RECYCLING SERVICE, INC. AS AMICUS
CURIAE IN SUPPORT OF PETITIONER**

—◆—
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QUESTION PRESENTED

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

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 1, 2, 8, 9, 11

STATUTES

City of Oakland Ordinance No. 13335*passim*

Oak. Mun. Code § 5.19.070.B10

Oak. Mun. Code § 5.19.070.F9

Oak. Mun. Code § 5.19.120.A10

Oak. Mun. Code § 5.19.120.F11

Oak. Mun. Code § 5.19.1509

Oak. Mun. Code § 5.19.180.A12

Oak. Mun. Code § 5.19.180.E12

OTHER AUTHORITIES

9/24/2015 Unattended Donation/Collection Box
Regulations Agenda Report, Table 1, at 5,
passed by the Oakland City Council on October
20, 2015, *available at* <https://oakland.legistar.com/LegislationDetail.aspx?ID=2468895&GUID=9BC491A6-C28D-4671-AB15-603A25FB8767>10

INTERESTS OF *AMICUS CURIAE*

In accordance with Supreme Court Rule 37, *Amicus Curiae* American Textile Recycling Service, Inc. (“ATRS”), respectfully submits this brief in support of the Petitioner.¹ ATRS is a for-profit collector and distributor of used clothing. ATRS operates donation bins in 10 states and over 2000 cities and municipalities across the country. ATRS is also a member of SMART Association, an international trade association of secondary materials and recycled textile providers. SMART members use and collect clothing, sort them according to their ability to be reused or recycled, and supply them to markets in need of the reused or recycled textile materials. As *amicus curiae*, ATRS presents the perspective of collectors and distributors of used clothing (“textile recyclers”) who operate donation bins throughout the country.

Amicus believes that this case raises important First Amendment issues that merit resolution – issues that critically impact its operations every day in numerous locations. *Amicus* urges this Court to vindicate its earlier holdings that non-profits have a right to

¹ Pursuant to Rule 37.3(a), all parties received timely notice of the intent to file this brief and have consented to the filing of this brief. Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amicus* notes that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to the preparation and submission of this brief.

raise awareness of their causes and, through spokesmen and fundraisers (including recycling bin operators such as *Amicus*) to seek donations. Charitable donors, furthermore, have a right to make donations to the non-profits of their choosing. Additionally, property owners and tenants have a right to support more than one cause that seeks to raise funds through clothing donations. In the case below, the Ninth Circuit upheld the City of Oakland's highly restrictive ordinance, which would strongly deter textile recycling bin operators from operating in the City of Oakland. This ordinance, accordingly, unduly interferes with the First Amendment rights of members of all of these groups, including *Amicus* and other members of the textile recycling industry.



SUMMARY OF ARGUMENT

The Court should grant a writ of certiorari in this case for the reasons cited by Petitioner. *Amicus* writes primarily to provide to the Court context about the operation of the for-profit secondary materials and recycled textiles industry. For-profit donation bin operators like *Amicus* provide a critical fundraising service to charitable organizations, large and small alike, many of which could not otherwise raise funds through clothing donations. The industry also provides an invaluable service to inhabitants across the developing world and has a significant positive impact on the environment.

In addition, *Amicus*, as a leading textile recycler, writes to highlight the importance of this case to the charitable organizations that it serves. City of Oakland Ordinance No. 13335, if permitted to stand, could make cost-prohibitive the operation of donation bins used by non-profits for critical fundraising efforts. ATRS's experience in other municipalities with similar restrictions shows how the Oakland Ordinance would deter bin operators from entering or continuing to operate in the City of Oakland. If ordinances like this are allowed to stand (and worse, proliferate), these restrictions will deprive innumerable non-profit charities of badly needed funds.



REASONS FOR GRANTING THE WRIT

For-profit donation bin operators like *Amicus* provide a critical fundraising service to charitable organizations, many of which could not otherwise raise funds through clothing donations (Part I). In addition, City of Oakland Ordinance No. 13335 (“the Oakland Ordinance” or “Ordinance”), if allowed to stand, would make it cost-prohibitive to use donation bins to raise funds for charities within the City of Oakland (“the City” or “Oakland”) (Part II). ATRS's experience in other cities with similar restrictions demonstrates how the Oakland Ordinance would likely deter bin operators from entering or continuing to operate in Oakland. As a result, this Ordinance would deprive many non-profits of the ability to request clothing donations and deprive potential donors of the opportunity to give to

the charities of their choosing, or to give at all (Part III).

I. *Amicus* and other for-profit donation bin operators provide a critical fundraising service that many charities could not provide themselves.

As ATRS's socially responsible business model demonstrates, for-profit donation bin operators provide a critical fundraising service to charitable organizations. The ATRS mission underscores that, despite its for-profit structure, the company exists to provide non-profit charities a critical fundraising service that many of these organizations could not provide themselves. ATRS was formed in 2001 after the founder, David M. Peganyee Sr., served as a volunteer for two years with the Houston Area Community Service ("HACS") in Houston, Texas. At that time, Mr. Peganyee's mother was the Executive Director of HACS and received clothing donations from the community that HACS was not able to utilize efficiently. Mr. Peganyee identified the need to redistribute these unwanted or excess donations and offered to sell the items to generate revenue for what HACS needed most: more food purchased from the Houston Food Bank to distribute to needy families.

Through his HACS volunteerism experience, Mr. Peganyee realized that he could help other charities in addition to HACS by "out-sourcing" the complex process of collecting, sorting, and redistributing clothing

donations to generate much-needed funds. Mr. Peganyee's effort began small but eventually developed into a global operation. At present, ATRS operates domestically in 10 states – Texas, California, Arizona, Colorado, Oklahoma, Georgia, Tennessee, Indiana, Michigan, and Florida – and also maintains a substantial international distribution.

ATRS raises money for a network of 21 registered non-profits. ATRS's partners include both large national organizations – such as Susan G. Komen, Mothers Against Drunk Driving (“MADD”), and the Children's Miracle Network – as well as smaller, local-based charities, such as Giving Children Hope (California), Colorado Adaptive Sports (Colorado), and City of Refuge (Georgia). These non-profit organizations incur no costs in partnering with ATRS. Rather, ATRS's non-profit affiliates collectively realize a cost-free benefit of over \$1 million per year in unrestricted fundraising dollars by partnering with ATRS to manage clothing and shoe donation programs in their cities. Currently, ATRS collects about 4 million pounds of clothing, shoes, and other textiles per month and generates more than \$1 million per year for these 501(c)(3) entities.

ATRS pays cash up front to its charity partners for every pound collected, while handling all logistical costs associated with processing the donations. ATRS assumes all the risk, incurring all the costs, paying all the fees, and employing all the labor necessary for the operation. ATRS obtains all necessary permits for

donation bins, interfaces with local officials and administrators, sets up and maintains the donation bins at each location, hires drivers and employees to regularly empty and service the bins and transport the clothing collected to ATRS's warehouses. ATRS further pays all costs associated with operating these warehouses, including leasing, ownership, and maintenance costs.

To conduct its operation, ATRS employs hundreds of workers in the United States alone. At the company's main sorting facility in Houston, ATRS employees sort, grade, and bale the clothing. ATRS then distributes these bales to second-hand clothing dealers and other secondary users of post-consumer textiles in markets, both within the U.S. and overseas, where high quality, affordable used clothing is in demand.

To provide a sense of scale, when ATRS enters a new municipality or market, it costs ATRS approximately \$1 million to set up that new operation. The start-up costs include purchasing and maintaining the bins, purchasing and maintaining the trucks, and paying the labor costs for drivers, warehouse employees, and managers. These high initial costs, coupled with the industry expertise needed, create significant barriers to entry for small, local non-profits hoping to access this kind of fundraising revenue. As such, this steady source of monthly fundraising revenue is one that ATRS's smaller, local partners would never be able to realize without the help of companies like ATRS because of the operational complexity and prohibitively

high costs. ATRS's fundraising service is thus particularly critical to grassroots programs and services offered by smaller, local non-profits. Several of ATRS's non-profit partners rely on the funds raised by ATRS for 80-100 percent of their operating revenue. Without it, they could not keep their doors open.

In addition to its positive impact in the United States, ATRS also provides an invaluable service to family owned micro-businesses across the developing world. ATRS exports about 80 percent of the textiles it collects to people in 18 different emerging nations across the globe who cannot afford new clothes, shoes, and household items. Furthermore, ATRS employs well over one hundred independent contractors in these nations. These contractors ensure that the clothing is distributed where it is most needed and communicate back to ATRS about their communities' continuing needs. ATRS incurs all of the costs associated with this large-scale, complex, multi-national distribution.

ATRS's operation additionally has a significant positive impact on the environment. ATRS is able to redistribute and repurpose 97-98 percent of the materials it collects. For those textiles that cannot be reused as garments, ATRS recycles them by turning them into insulation, cotton rags, or automotive or furniture upholstery, among other uses. Currently, Americans donate 15 percent of their textiles, or roughly 2 million tons of textiles collectively each year.² These donations

² SMART Association, <https://www.smartasn.org/SMARTASN/assets/File/resources/infographic-banner3greenhouse.pdf>.

have the equivalent carbon-reducing impact of removing *1 million cars per year from America's highways*.³ Textile donations presently have a larger impact on reducing America's carbon footprint than annual glass and plastic recycling within the U.S., combined.⁴ Recycling textiles also helps the environment by reducing the demand for new textiles manufactured with harsh chemicals, waste products, and waste water.⁵ U.S. textile recyclers, including ATRS, collectively generate roughly \$100 million in funds for charitable organizations from the sale of these materials each year.

II. The Oakland Ordinance would make cost-prohibitive the operation of donation bins used by non-profits for critical fundraising efforts.

Oakland Ordinance No. 13335, if allowed to stand, would make it cost-prohibitive for both non-profit and for-profit donation bin operators such as ATRS to operate donation bins in Oakland. Without bin operators like ATRS, a host of non-profit charities in Oakland would be deprived of the ability to engage in First Amendment protected conduct – soliciting clothing

³ SMART Association, <https://www.smartasn.org/SMARTASN/assets/File/resources/infographic-banner3greenhouse.pdf>.

⁴ SMART Association, <https://www.smartasn.org/SMARTASN/assets/File/resources/infographic-banner3greenhouse.pdf>.

⁵ SMART Association, <https://www.smartasn.org/resources/frequently-asked-questions/>.

donations to further their causes. There are four key restrictions of the Ordinance that make it cost-prohibitive and/or otherwise interfere with the ability of bin operators to engage in First Amendment protected activity in Oakland.

First, the Ordinance requires the bin operator to provide proof of a \$1 million insurance policy per bin.⁶ This requirement alone makes compliance with the ordinance cost-prohibitive to almost every entity. ATRS currently has an umbrella insurance policy that covers all of its bins across the nation. In every other municipality in which ATRS operates, such an umbrella policy provides more than enough coverage. It is thus unclear on what basis a \$1 million *per bin* policy requirement could be justified. Furthermore, the cost to bin operators like ATRS of obtaining a \$1 million policy per bin would cost more than the revenue these operators would generate from each bin. A licensing requirement that effectively prevents would-be licensees from being able to operate is not a licensing requirement at all. It is an outright ban.

Second, the Ordinance also requires every bin operator to pay a \$535.31 initial fee for each bin placed

⁶ Oak. Mun. Code § 5.19.070.F (requiring all bin operator applicants to provide “[p]roof 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”); § 5.19.150 (“Applicants and/or owners/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.”).

at a new location (the “Application Fee”).⁷ That Application Fee is sufficiently onerous to deter bin operators from entering the market. Oakland’s Application Fee is anywhere from *four to twenty times* higher than the initial application fee charged by the municipalities in which ATRS currently operates. Because of the significant initial investment costs associated with entering into a new market, discussed above, to make it financially feasible for a bin operator to enter a new market, the operator must place a significant volume of bins in the municipality. ATRS conducted a study on Oakland a few years ago, before this Ordinance was passed, and estimated that ATRS would need to place a critical mass of at least 100 bins in order to justify entering the Oakland market. With an Application Fee of \$535.31 per bin, if a bin operator were to place 100 bins in Oakland, it would owe the City \$53,531 in application fees alone in order to enter the market. Such significant application fees would strongly deter entities like ATRS from operating in Oakland.

Third, the Ordinance prohibits bin operators from placing bins within 1,000 feet of any other bin unless the bin operator owns or leases the property on which the bin is located. *See* Oak. Mun. Code § 5.19.120.A. Furthermore, unless a special exemption is given, the Ordinance prohibits bin operators from placing more

⁷ *See* § 5.19.070.B; 9/24/2015 Unattended Donation/Collection Box Regulations Agenda Report, Table 1, at 5, passed by the Oakland City Council on October 20, 2015, *available at* <https://oakland.legistar.com/LegislationDetail.aspx?ID=2468895&GUID=9BC491A6-C28D-4671-AB15-603A25FB8767>.

than one bin on any parcel of land (a “One Bin Per Parcel” requirement). § 5.19.120.F. These restrictions reduce the financial feasibility of operating in the City because, to make it financially feasible for a bin operator to enter a new market, the bin operator must place in the municipality a significant volume of bins (anywhere from 10-250). Bin volume restrictions like the 1000-ft. and One Bin Per Parcel restrictions make it particularly difficult for textile recyclers to be able to identify enough qualifying locations where they can place bins to satisfy the critical mass required to enter a new market.

The 1000-ft. and One Bin Per Parcel restrictions are additionally troubling from a First Amendment perspective. They interfere with the ability of would-be textile donors to choose, as is their right, among the causes they would prefer to support. These requirements further prevent bin operators from being able to make First Amendment protected donation requests on behalf of the non-profits they support at any location that has already been captured by another bin operator. This inevitably interferes with the ability of these non-profit speakers to reach audiences who frequent those locations that have already been captured by another bin operator. Similarly, these requirements interfere with the ability of the property owners or lessees to engage in their First Amendment right to choose more than one charity to publicly support in this manner.

Fourth, the Ordinance provides a private right of action against bin operators – but *not* against the City

– to “[a]ny person claiming a violation of” the Ordinance to enforce the provisions of the ordinance. §§ 5.19.180.A,E. ***Amicus* is not aware of any other municipality that has enacted a private right of action provision like this.** The inclusion of such a provision adds the additional risk of expensive litigation costs. It would, moreover, interfere with the ability of bin operators to negotiate with municipal authorities to mitigate and resolve alleged violations without escalating to costly administrative or legal proceedings. *Amicus* submits that the risk of significant and unnecessary litigation expenses emanating from the inclusion of such a provision would strongly deter entities like ATRS from operating in Oakland. In combination, these four aspects of the Oakland Ordinance operate to effectively make it cost-prohibitive for bin operators like ATRS to operate in Oakland.

III. ATRS’s experience in other municipalities illustrates how the Oakland Ordinance would deter textile recyclers from operating.

ATRS has been forced to cease or greatly limit operations in municipalities that have adopted restrictions similar to the Oakland Ordinance. As one example, ATRS formerly operated in Fort Worth, Texas, where it collected 250,000 pounds of clothing per month, which translated to approximately \$60,000 per year in funds collected for ATRS’s non-profit partners. Fort Worth, however, began regulating donation bins in 2014 by permitting them to operate only in limited zoning areas and only if the operator could obtain

a special exemption permit, which required a steep, \$750 per bin application fee. Though ATRS desired to continue operating in Fort Worth, it concluded that, in the face of these restrictions, it would no longer be financially feasible to do so and withdrew from the market. As a result, ATRS's non-profit partners in Fort Worth, including the Children's Miracle Network, have since been deprived of at least \$60,000 in funds annually.

Likewise, restrictive ordinances have kept ATRS out of municipalities that it would have liked to serve. In 2016, Gwinnett County, Georgia, passed restrictions very similar to the Oakland Ordinance – restrictions that essentially barred ATRS from being able to operate there, just as the Oakland Ordinance would do. Gwinnett County's ordinance required operators to obtain a \$1 million liability insurance policy per bin, imposed significant restrictions on the number of bins per property, and required operators to pay a \$250 application fee per year, in addition to other costly requirements. Because of these onerous restrictions, ATRS was forced to abandon its efforts to operate in Gwinnett County. As a result, local non-profits in the area such as City of Refuge have been deprived of an additional source of fundraising revenue.



CONCLUSION

Amicus ATRS respectfully urges the Court to grant Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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