

No. 24-756

---

IN THE  
**Supreme Court of the United States**

---

NATIONAL FEDERATION OF THE BLIND OF  
TEXAS, INCORPORATED, *et al.*,

*Petitioners,*

*v.*

CITY OF ARLINGTON, TEXAS,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

**BRIEF OF *AMICI CURIAE* GREEN ZONE  
RECYCLING, SECONDARY MATERIALS  
AND RECYCLED TEXTILES ASSOCIATION,  
& USAGAIN, IN SUPPORT OF PETITIONERS**

---

DANIEL P. DALTON  
*Counsel of Record*  
DALTON & TOMICH, PLC  
719 Griswold Street, Suite 207  
Detroit, MI 48226  
(313) 859-6000  
ddalton@daltontomich.com

*Counsel for Amici Curiae*



**TABLE OF CONTENTS**

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES .....	ii
INTERESTS OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	6
I.    Unattended Donation Boxes, as Charitable Solicitation, are Fully Protected Speech under Supreme Court Precedent .....	6
II.   Governmental Regulation of Unattended Donation Boxes is a Content Based Distinction .....	9
III.  Regulation of Unattended Collection Bins Must be Subject to Strict Scrutiny .....	14
IV.  The Ordinance Fails Constitutional Muster Under Strict Scrutiny.....	16
CONCLUSION .....	20

## TABLE OF CITED AUTHORITIES

*Page*

### CASES

<i>City of Austin v. Reagan National Advertising of Austin, LLC</i> , 596 U.S. 61, 142 S. Ct. 1464 (2022) . . . . .	11, 13, 14
<i>F.C.C. v. Pacifica Foundation</i> , 438 U.S. 726, 98 S. Ct. 3026 (1978) . . . . .	9
<i>National Federation of the Blind of Texas, Inc. v. Abbott</i> , 647 F.3d 202 (5th Cir. 2011) . . . . .	7
<i>National Federation of the Blind of Texas, Inc. v. City of Arlington</i> , 109 F.4th 728 (5th Cir. 2024) . . . . .	4, 7, 8, 10-12, 16, 17
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254, 84 S. Ct. 710 (1964) . . . . .	3
<i>Planet Aid v. City of St. Johns</i> , 782 F.3d 318 (6th Cir. 2015) . . . . .	5, 7, 15-19
<i>Police Dept. of City of Chicago v. Mosley</i> , 408 U.S. 92, 92 S. Ct. 2286 (1972) . . . . .	3
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377, 112 S. Ct. 2538 (1992) . . . . .	3, 9

*Cited Authorities*

	<i>Page</i>
<i>Recycle for Change v. City of Oakland</i> , 856 F.3d 666 (9th Cir. 2017) . . . . .	5, 8-10
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155, 135 S. Ct. 2218 (2015) . . .	3, 5, 9-15, 17-20
<i>Riley v. National Federation of the Blind of North Carolina, Inc.</i> , 487 U.S. 781, 108 S. Ct. 2667 (1988) . . . . .	6, 14
<i>Secretary of State of Maryland v. Joseph H. Munson Co., Inc.</i> , 467 U.S. 947, 104 S. Ct. 2839 (1984) . . . . .	6
<i>United States v. Playboy Entertainment Group, Inc.</i> , 529 U.S. 803, 120 S. Ct. 1878 . . . . .	16, 18
<i>Village of Schaumburg v. Citizens for a Better Environment</i> , 444 U.S. 620, 100 S. Ct. 826 (1980) . . . .	3, 6, 7, 9, 15, 20
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781, 109 S. Ct. 2746 (1989) . . . . .	11

**CONSTITUTIONAL PROVISIONS**

U.S. CONST. amend. I . . . . .	1, 3, 4, 6-11, 15, 20
--------------------------------	-----------------------

*Cited Authorities*

*Page*

**STATUTES AND OTHER AUTHORITIES**

City of Arlington, Texas, Ordinance No. 18-044 .....	4, 16-19
L.A., Cal., Mun. Code § 12.03 (2021).....	12, 14
L.A., Cal., Mun. Code § 12.1.23(c)(2) (2021) .....	13

**INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

The *Amici Curiae*, Green Zone Recycling, Secondary Materials and Recycled Textiles Association, and USAgain, are organizations whose work is dedicated to promoting a more sustainable textile industry domestically and globally. Therein such work lies the advocacy and education of their visions, made possible largely to the deployment of donation boxes across the country. The *amici curiae* consequently hold exceptional interest in applying strict scrutiny as the standard under a First Amendment challenge to governmental regulations restricting unattended donation bins.

Broadly, the work held in common amongst the *amici curiae* is the collection of donated clothing and footwear purposed for reusing and recycling said items. Secondary Materials and Recycled Textiles Association, also known as “SMART”, is an international trade association whose headquarters is based in the state of Maryland. SMART is composed of companies across the world that are involved in the textile recycling industry. As member companies of SMART’s association, they use and convert recycled, secondary materials such as used clothing, commercial laundries, nonwoven and off spec material, new mill ends and paper. Just in the United States, SMART has over fifteen hundred (1,500) member companies that are located in numerous states. For approximately ninety-

---

1. No counsel for a party authored this brief in whole or in part. No person other than *amici* or its counsel made a monetary contribution to its preparation or submission. *Amici*, by and through its counsel, notified counsel of record for all parties to this case of their intention to file this brief in accordance with Rule 37.2 of the Rules of the Supreme Court of the United States.

two years, SMART has promoted and advocated for high standards as well as best practices for the recycling of textiles and related secondary materials.

Similarly, USAgain is a company focused on collecting and reusing clothes. USAgain was founded in 1999 and currently operates in nine states, with its headquarters located in West Chicago, Illinois. As a clothes collection company, USAgain's central business model involves strategic placement of its donation bins. The company partners with local affiliates such as schools and businesses which provide sites for TreeMachines to collect gently used clothes and shoes. The bins will be unloaded by USAgain staffers and processed for transport to wholesalers, graders, and secondhand stores. A fundamental aspect of USAgain's work is to influence and educate people about its purpose in creating donation boxes used clothing items.

Lastly, Green Zone Recycling is the largest textile recycler and wholesale distributor of secondhand apparel and footwear in the southeast United States market. Green Zone Recycling ("Green Zone") is headquartered in Durham, North Carolina, and was founded with a mission to make the future in global textile and fashion industry more sustainable. Green Zone transacts with commercial centers, individual retail locations, and multi-family communities to provide textile deposit bins or stations. The company's goal is to promote sustainability while reducing landfill waste, by collecting and redirecting textiles to secondhand markets.

Apart from their practical use with collection, donation bins serve as crucial vehicles for conveying messages central to the organizations' causes. As these

organizations operate throughout the country in a number of states, the differing interpretations by federal circuits over how to level of scrutiny applies to certain governmental regulations, threatens these organizations' protected speech.

### INTRODUCTION AND SUMMARY OF ARGUMENT

In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826 (1980), the United States Supreme Court definitively recognized charitable solicitation, as a form of protected speech. Bedrock protections under the First Amendment ensure that governments “shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. Laws which “target speech based on its content—are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218 (2015); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538 (1992); see *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95-96, 92 S. Ct. 2286, 2290 (1972) (quoting, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964)) (“Any restriction on expressive activity because of its content would completely undercut the ‘profound national commitment to the principle of debate on public issues should be uninhibited, robust, and wise-open.’”). Accordingly, content-based regulations over protected speech are subject to strict scrutiny, the highest form of scrutiny under the United States Constitution.



At issue before the Court is the Fifth Circuit’s incorrect application of intermediate scrutiny to determine the constitutionality of regulations restricting donation boxes in *National Federation of the Blind of Texas, Inc. v. City of Arlington*, 109 F.4th 728 (5th Cir. 2024) (“*NFB*”). As articulated by the Fifth Circuit in *NFB*, there are two sections within the City’s Ordinance No. 18-044 (“Ordinance”) particularly in contention:

“a zoning provision limiting the permissible placement of donation boxes to three of the city’s 28 zoning districts, [] and a setback requirement, mandating that donation boxes, if adjacent to a street right-of-way, be placed either behind an existing landscape setback or 40-feet away.” *Id.* at 732 (citing, Arlington, Tex., Ordinance 18-044 §§ 3.01(C), 3.03(I)).

Under § 2.01 of the Ordinance, “donation boxes” are defined as “any drop-off box, container, trailer, or other receptacle that is intended for use as a collection point for accepting donated textiles, clothing, shoes, books, toys, dishes, household items, or other salvageable items of personal property.” *Id.*

As a form of charitable solicitation, Petitioner’s donation boxes constitute as protected speech pursuant to the First Amendment’s Free Speech Clause. In *NFB*, the Fifth Circuit acknowledged as much that donation boxes constitute as charitable solicitations i.e., “protected expression. *Id.* at 733-34. Therefore, the Ordinance prompted First Amendment analysis, which requires determination over the level of scrutiny to apply. *Id.*

The Respondent, City of Arlington, implemented zoning regulations that operate as an effective ban on unattended donation bins. The Fifth Circuit erred in its analysis by deducing that the regulations imposed were content-neutral and therefore, intermediate scrutiny applied. What the Fifth Circuit held only adds to a prominent split amongst the federal circuits. Namely between the Sixth and Ninth Circuits, the courts are divided as to whether restrictions of donation boxes' is content-based or content-neutral under the Constitution. *See generally, Planet Aid v. City of St. Johns*, 782 F.3d 318 (6th Cir. 2015); *Recycle for Change v. City of Oakland*, 856 F.3d 666 (9th Cir. 2017).

In granting *certiorari* this Court can remedy three erroneous conclusions of law in the present case, and as observed in the Ninth Circuit's handling of unattended collection bins. First, this Court can recognize the operation of collection bins is fully protected speech, not expressive conduct. Second, this case presents a perfect vehicle to further develop the content-based test laid out in *Reed v. Town of Gilbert*. Third, the case demonstrates the dangers of intermediate scrutiny's means-ends consequences and provides this Court an opportunity to ensure ordinances regulating protected speech, in the form of unattended collection bins, are subject to strict scrutiny.

## ARGUMENT

### **I. Unattended Donation Boxes, as Charitable Solicitation, are Fully Protected Speech under Supreme Court Precedent.**

The Court has long recognized charitable solicitation is fully protected speech. *See Schaumburg*, 444 U.S. at 632; *see also Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 104 S. Ct. 2839 (1984) (“the [municipal ordinance] percentage restriction on charitable solicitation was an unconstitutional limitation on protected First Amendment solicitation activity.”); *see also, Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S. Ct. 2667 (1988) (reaffirmed *Schaumburg* holding). Solicitation combines “a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.” *Schaumburg*, 444 U.S. at 632.

In *Schaumburg*, the Court did not question whether charitable solicitations fell within the First Amendment’s protections for speech, stating rather, “[i]t is clear that they are.”<sup>2</sup> *Id.* at 633. Importantly, while recognizing charitable solicitation as protected speech, the Court did not limit what forms such solicitation must take to fall under speech protections. *Id.* The question before the Court instead

---

2. The Village of Schaumburg adopted an ordinance in March 1974 titled, “An Ordinance Regulating Soliciting by Charitable Organizations”, which prohibited door-to-door solicitation of contributions by charitable organizations not using at least 75% of their receipts for “charitable purposes.” *Schaumburg*, 444 U.S. at 623-624.

was whether the Village of Schaumburg implemented regulations over charitable solicitation in a manner as not to unduly intrude upon the rights of free speech. *Id.* at 633. The government may regulate solicitation but such regulation “must be undertaken with due regard for the reality that 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, and for the reality that without solicitation the flow of such information and advocacy would likely cease.” *Id.* at 632.

The donation bins at issue embody this point. As acknowledged by the Fifth Circuit, they are “silent solicitors and advocates for particular charitable causes.” *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 213 (5th Cir. 2011). The bins not only solicit donations, but their very presence informs citizens of the charitable organization’s existence and mission “in many respects mirror[ing] the passive speaker on the side of the road, holding a sign drawing attention to his cause.” *Planet Aid*, 782 F.3d at 325. “At a minimum, the donation boxes implicitly advocate for the donation of clothing and household goods to that particular charity. *Abbott*, 647 F.3d at 213. Collection bins undoubtedly demonstrate the truth recognized in *Schaumburg* “that solicitation is characteristically intertwined with informative . . . speech.” *Schaumburg*, 444 U.S. at 632.

In *NFB v. City of Arlington*, the Fifth Circuit does not dispute that donation boxes or collection bins constitute as charitable solicitations thereby warranting First Amendment protections. *See*, 109 F.4th at 733-34 (“[c]haritable solicitations are fully protected speech,

and because the [o]rdinance regulates all donation boxes . . . at least some of the donation boxes regulated by the [o]rdinance contain charitable solicitations.”) The same can be deduced from the Ninth Circuit’s decision in *Recycle for Change v. City of Oakland*, 856 F.3d 666, 672 (9th Cir. 2017). On a First Amendment challenge over city ordinance regulating unattended donation boxes, the Ninth Circuit recognized the ordinance impacted “to a degree [Recycle for Change’s] ability to communicate its charitable solicitations message on private property.” *Id.* at 669. Therefore, the First Amendment analysis is triggered, requiring a level of scrutiny over the ordinance regulating such speech. *Id.*

However, the Ninth and Fifth Circuits have deemphasized this essential feature of collection bins demonstrating as informative speech with their solicitation, when analyzing laws regulating their placement. Specifically, the Ninth Circuit considers the regulation of collection bins to be content neutral because “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.” *Recycle for Change*, 856 F.3d at 672. The court believes that “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.” *Id.* at 672 n.4. Similarly in the case at bar, the Fifth Circuit relied on the Ordinance’s regulation of location, as opposed to the communicative content of the bins message, to support application of intermediate scrutiny. *NFB*, 109 F.4th at 736.

Both approaches disregard this Court’s proclamation that “solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes.” *Schaumburg*, 444 U.S. at 632. If the act of solicitation is inextricably intertwined with the pure speech of the organization, it is malfeasance for these Circuits to employ analytical frameworks which separate the speech elements of the bins from conduct, which the courts view as “neither expressive nor communicative.” *Recycle for Change*, 856 F.3d at 672. Such an approach is Sisyphean. As such, this Court should grant review to reaffirm the holding of *Schaumburg* and recognize unattended donation boxes are pure charitable speech.

## **II. Governmental Regulation of Unattended Donation Boxes is a Content Based Distinction.**

The First Amendment requires “the government to remain neutral in the marketplace of ideas.” *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 745–746, 98 S. Ct. 3026, 3038–3039 (1978). A content-based law “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 v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 2227 (2015). The First Amendment is especially hostile to content-based laws to ensure the government is not regulating speech “based on hostility—or favoritism—towards the underlying message expressed.” *R.A.V. v. St. Paul*, 505 U.S. 377, 386, 112 S. Ct. 2538, 2545 (1992). It is an established hallmark that the level of scrutiny applied to a First Amendment challenge depends on what the regulation is classified as.

The Fifth Circuit in this case incorrectly determined the Ordinance to be content neutral i.e., “regulates all donation boxes without reference to content.” *NFB*, 109 F.4th at 734. The court explained “the Ordinance ‘discriminates on the basis of non-expressive, non-communicative conduct’—solicitation manner and place—but does ‘not discriminate based on topic, subject matter, or viewpoint.’” *Id.* (quoting *Recycle for Change*, 856 F.3d at 672). Similarly, the Ninth Circuit found the law in *Recycle for Change* content neutral because it “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.” 856 F.3d at 672.

However, laws targeting unattended donation bins are clear examples of content-based regulations under the framework set forth in *Reed*. Under *Reed*, the Court addressed in relevant part whether an ordinance (“Sign Code”) restricting the size, number, duration, and location of temporary directional church signs violated the Free Speech Clause of the First Amendment. 576 U.S. 155. This Court unanimously found such restrictions were “content based” in violation of the First Amendment. *Id.* at 164-165. Under *Reed*’s analysis, regulations can be identified as content based on their face through distinctions that define speech by particular subject matter, or from more subtle distinctions that define regulated speech by its function or purpose. *Id.* at 163. Further, the Court reaffirmed its precedent recognizing that facially neutral laws can be considered content based where such laws cannot be “justified without reference to the content of the regulated speech, or that were adopted by the government because

of disagreement with the message the speech conveys.” *Id.* at 164 (quoting, *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989)) (internal quotations omitted).

The Court furthered its analysis of content-based regulations under a First Amendment challenge in *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61, 142 S. Ct. 1464 (2022) (“*Reagan*”). The City of Austin’s sign code at the time restricted the digitization for off-premises signs that were not similarly restricted for on-premises signs.<sup>3</sup> Therefore, the issue before the Court was whether the city’s onsite and offsite distinctions were facially content neutral under the First Amendment. *Id.* While finding the distinctions to be content neutral, the Court reemphasized *Reed*’s analysis. *Id.* “Unlike the sign code in *Reed*, the [c]ity’s sign ordinances here do not single out any topic or subject matter for differential treatment.” *Id.* at 169. In *Reed*, the subject sign code applied size, time, and placement restrictions to twenty-three different categories of signs, wherein some categories received more favorable treatment than others (i.e., directional signs concerning certain events such as religious and educational events). *Id.* at 169. As a result, the regulations in *Reagan* fit within neutral time, place, manner provisions.

With *NFB*, the Fifth Circuit focused too narrowly on whether the law discriminates between donation bins

---

3. The City of Austin’s sign code regulated signs which advertised for things not located on the same premises as the sign, which included directional signs for people to offsite locations. *Reagan*, 596 U.S. 61, 142 S. Ct. at 1466. At the time the sign code prohibited the construction of new offsite signs. *Id.*



for charity and non-charitable causes. This approach completely fails to engage with the discrimination between donation bins and every other type of collection bins. In its approach the lower court misapplied *Reed* by asking whether the Ordinance “has a content-based purpose or justification.” *NFB*, 109 F.4th at 735. The Court in *Reed* recognized “a speech regulation targeted at a specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.” *Reed*, 576 U.S. at 169. These laws apply only to a specific subject matter, donation bins, and single the donation bins out for harsher treatment than other types of collection bins, like those for recycling.<sup>4</sup> As the Court outlined in *Reed*,

“The Town’s Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.” *Id.* at 169.

By treating one type of collecting bin (i.e., donation bins) different from other collection bins, such as for ballots,

---

4. Some laws regulating donation bins go as far as to expressly exempt from their coverage bins collecting recyclable materials “not intended for re-use.” See City of Los Angeles Ordinance #187248, under L.A., Cal., Mun. Code § 12.03 (current through legislation effective September 30, 2024).

recyclables or refuse, the ordinances on their facially content-based restrictions. *Id.*

The case at hand presents a perfect opportunity for this Court to further expand on *Reed* and *Reagan* regarding how to properly scope the inquiry of content-based restrictions. *See, Reagan*, 596 U.S. at 69. As discussed above, whether the discriminatory impact of these laws is measured against donation bins as a singular class, or all classes of donation bins is outcome determinative. Thus, in many cities, bins collecting items for recycling are treated different from bins collecting items for re-use. For example, the City of Los Angeles adopted an Ordinance #187248 in October 2021, which effectively prohibits donation bins by limiting their placement exclusively to commercial zones with additional restrictions while in said zones.<sup>5</sup> Notably, under the Los Angeles Ordinance, bins collecting “recyclable materials not intended for

---

5. Pursuant to L.A., Cal., Mun. Code § 12.21.23(c)(2): “Collection Bins shall not be located:

- (i) Within 20 feet of any public right-of-way.
- (ii) Within 10 feet of any lot line adjoining another lot.
- (iii) Within 100 feet of any A- or R- zoned lot.
- (iv) Within any required landscaped area.
- (v) Within any area that will reduce the number or size of, or impede access to, any required parking spaces on the lot on which the Collection Bin is located.
- (vi) Within any area that will impede access to, or be located within, a trash enclosure area.
- (vii) Within any area that will impair the functioning of exhaust, ventilation, or fire extinguishing systems.

re-use” are exempt from these regulations. L.A., Cal., Mun. Code § 12.03 (2021). Moreover, “Mobile Recycling Centers” which are “receptacle[s], usually a trailer, for the collection of recyclable materials”, to operate as of right at any grocery market. *Id.* at § 12.03.

In *Reed* this Court did not evaluate whether the Sign Code discriminated between different types of political signs but rather compared the treatment of political signs to temporal signs and ideological signs. 576 U.S. 155. Similarly, the content-based inquiry of laws regulating charitable donation bins should compare the treatment of such bins to all other types of collection boxes or bins, such as recyclables, trash, and ballots. The donation bins are treated differently “entirely [due to] the communicative *content* of the” bin. *Id.* at 164 (emphasis added). Although the Ordinance may apply equally to charitable and for-profit donation bins, this distinction should not be dispositive under *Reed* when the law facially singles out the whole subject matter of “donation bins” for lesser treatment from all other collection bins.

### **III. Regulation of Unattended Collection Bins Must be Subject to Strict Scrutiny.**

Precedent demands strict scrutiny be applied when governmental regulations are determined to be content based. *Reed*, 576 U.S. at 156; *Reagan*, 596 U.S. 61; *e.g.*, *Riley*, 487 U.S. at 795. “Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional”. *Reed*, 576 U.S. at 155. Accordingly, content-based laws must be struck down unless “the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Id.* at 171

(internal quotations omitted). “Broad, prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone.” *Schaumburg*, 444 U.S. at 637. Additionally, as demonstrated by the Fifth Circuit below, intermediate scrutiny is wholly unworkable in these cases. The standards applied in the Ninth and Fifth Circuits upheld regulatory schemes which function as effective bans on speech.

Under *Reed*, the Court articulated “[w]hether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny.” 576 U.S. at 156. Moreover, the Court has applied strict scrutiny to regulations deemed “facially neutral” yet, operate in such a way as to inevitably confront the content of regulated speech. *See id.* at 164. Specifically, the Court established “[t]hose laws, like those that are content based on their face, must also satisfy strict scrutiny.” *Id.* at 164.

The decision to apply intermediate scrutiny to collection bin regulations in the lower federal courts lacks principle and guidance. Courts have applied strict scrutiny to otherwise content-neutral donation bin ordinances if the ordinance operates as a total ban. *See Planet Aid*, 782 F.3d at 329–330. For example, the Sixth Circuit articulated governments may regulate physical characteristics of outdoor structures i.e., height, size, cleanliness, or location. *Id.* However, in *Planet Aid*’s case, the ordinance at issue banned altogether a complete category of objects that convey an expressive message protected by the First Amendment. *Id.* at 329–330. In that instance, the ordinance operates as content based. *Id.*

If a total ban is all or nothing, a law which prohibits donation bins in all zoning districts but one would be subject to intermediate scrutiny. These laws are overly restrictive and function as effective bans on the protected activity. For example, a law banning in person solicitation in all residential and commercial zones in a particular city would never be upheld. However, a court will uphold a law which bans donation bins in twenty-five of the city's twenty-eight zoning districts. *See NFB*, 109 F.4th at 737, 738–739. “The distinction between laws burdening and laws banning speech is but a matter of degree.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812, 120 S. Ct. 1878 (2000). A content-based law burdening donation bins throughout much of a city must satisfy the same rigorous scrutiny as content-based bans. *Id.*

#### **IV. The Ordinance Fails Constitutional Muster Under Strict Scrutiny.**

The Ordinance at issue constitutes as a content-based restriction on protected speech in the form of charitable solicitation and therefore, it can stand only if it satisfies strict scrutiny. *See Planet Aid*, 782 F.3d at 330 (quoting, *Playboy Entm’t Grp., Inc.*, 529 U.S. at 813). And “[i]n order for a law regulating speech to pass constitutional muster, under the strict scrutiny test, the law must be narrowly tailored to promote a compelling government interest.” *Id.* at 330.

First, the Ordinance applies expressly to “donation boxes”, it defines as those “intended for use as a collection point for accepting donated textiles, clothing, shoes, books, toys, dishes, household items, or other salvageable items of personal property.” Arl., Tex., Ord. 18-044 §§ 2.01, 3.01(C),

3.03(I). While the Fifth Circuit deemed the Ordinance as facially neutral, it is distinctly applied to boxes, bins, containers, receptacles that convey an expressive message on a particular topic—charitable solicitation and giving. *See Planet Aid*, 782 F.3d at 328. The fact that it may regulate “all donation boxes, encompassing both charitable and non-charitable solicitations” does not qualify the Ordinance as content neutral. *NFB*, 109 F.4th at 735. At most, the Ordinance could be deemed as viewpoint neutral. That is not enough to lower the level of scrutiny when the Court in *Reed* clearly articulated regulations “targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.” 576 U.S. at 169. Moreover, this distinction between profit-making and nonprofit entities lacks relevance. When applied, the Ordinance results in the prevention of all charitable solicitation engaged as unattended donation bins.

Furthermore, the Ordinance’s stated purpose is “to protect the public health, safety and welfare of Arlington residents, . . . protect the aesthetic well-being of the community, and promote the tidy and ordered appearance of developed property.” *NFB*, 109 F.4th at 732 (quoting Ordinance 18-044 § 1.02). Yet, the listed concerns would “apply with equal force to non-expressive outdoor receptacles such as dumpsters, receptacles at recycling centers, and public and private trash cans.” *Planet Aid*, 782 F.3d at 328. Thus, the regulation imposes differential treatment on charitable organizations regardless of whether it refers to for-profit and nonprofit entities.

By consequence, the Ordinance distinguishes donation boxes from other drop-off receptacles by identifying

them as “intended” to be used for specific set of donated “salvageable” items. *See*, Ord. 18-044 § 2.01. As such, to be sustained under strict scrutiny, it is the City’s burden to justify the Ordinance’s differentiation between donation boxes and other types of unattended boxes such as recyclable bins and trash bins, furthers its compelling governmental interest and is narrowly tailored to that end. *Reed*, 576 U.S. at 163. And this it has not and cannot satisfy. The City’s Ordinance operates rather as an effective ban to all charitable donation bins irrespective of its provision permitting the bins in three nonresidential zoning districts.

As highlighted in *Planet Aid*, the effect of such a regulation implies without evidence, lesser restrictive means for the Government to further its compelling interests all are automatically ineffective.<sup>6</sup> 782 F.3d at 331. “If a less restrictive alternative would serve the Government’s purpose, the [c]ity must use that alternative.” *Id.* at 330 (quoting, *Playboy Entm’t Grp, Inc.*, 529 U.S. at 813) (internal quotations omitted). Under Ordinance No. 18-044, all donation boxes are already required to apply for and receive a special permit before any placement within the City. In addition to receiving said permit, there are requirements to keep said boxes clean, the maximum size of a donation box, number of boxes allowed, and restrictions as to the color of a box. *See* Ord. 18-044 §§ 3.03. For instance, under § 3.03(C) of the

---

6. “This implies without evidence, that charities would be negligent in failing to conduct timely pickups of donated goods, in maintaining the appearance of the bins, etc. Further, it assumes that lesser, content-neutral restrictions such as requiring weekly or bi-weekly pickups or inspections of all outdoor receptacles would be ineffective.” *Planet Aid*, 782 F.3d at 331.

Ordinance as it concerns requirements to keep donation boxes clean, “[a] permit holder shall be responsible for collecting the contents of the donation box to prevent overflow and littering.”<sup>7</sup> Notwithstanding, the City has not demonstrated how these additional provisions or “less restrictive means”, targeted at ensuring maintenance and sanitation, still fail to promote such concerns. *See Planet Aid*, at 330. The complete prohibition of donation boxes in all but three zoning districts is a blanket presumption that these self-labeled “permit requirements”, will nonetheless be ineffective throughout most of the City.

Regardless of whether the City’s interests can be deemed compelling, the Ordinance is not narrowly tailored to promote those interests. This Court’s precedent is clear, strict scrutiny requires the Government to use less restrictive alternative means when available. *Id.*; *Reed*, 576 U.S. 155. The City in this case has failed to abide by such requirement.

---

7. *See generally*, Ord. 18-044 § 3.03(C): “Requirement to keep clean. A permit holder shall be responsible for collecting the contents of the donation box to prevent overflow and littering. A permit holder shall keep the real property situated within 25 feet of the location of a donation box clean and free of trash, debris, broken glass, coat hangers, clothes, clothing accessories, or excess donations. A permit holder that fails to maintain the cleanliness of the surrounding real property may receive a notice of violation from the City. If the City elects to send a notice of violation to the email address on file for the permit holder, the permit holder shall have 48 hours to remedy the complaint. Failure to comply with a notice of violation may result in the issuance of a citation by the City. A permit holder who is issued a citation within the one-year term of a donation box permit is subject to revocation of the associated donation box permit.”



## CONCLUSION

The regulations at issue represent an unconstitutional burden on charitable solicitation, a form of speech historically recognized under First Amendment protections. The precedent set forth by *Schaumburg*, applies directly to unattended donation boxes as pure speech, and should be recognized as so by this Court. 444 U.S. 620. Laws which “target speech based on its content—are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests. *Reed*, 576 U.S. at 163. Accordingly, content-based regulations over speech are subject to the highest form of scrutiny under the Constitution. By subjecting such speech to content-based restrictions and failing to apply strict scrutiny as required under the Constitution, the Fifth Circuit undermined established principles of free speech.

The application of intermediate scrutiny to restrictions on charitable donation bins by the Ninth and now Fifth Circuits, risks governmental overreach in justifying effective bans on protected forms of speech. This Court resolve such error through its framework under *Reed*, and ensure ordinances regulating protected speech, in the form of unattended collection bins, are subject to strict scrutiny.

For these reasons, petition for certiorari should be granted, the rigorous scrutiny required for content-based speech restrictions reaffirmed, and vital constitutional protections to charitable speech preserved.

Respectfully submitted,

DANIEL P. DALTON  
*Counsel of Record*  
DALTON & TOMICH, PLC  
719 Griswold Street, Suite 207  
Detroit, MI 48226  
(313) 859-6000  
ddalton@daltontomich.com

*Counsel for Amici Curiae*