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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The City of Oakland's response adopts the same analysis—and makes the same mistakes—as the Ninth Circuit's opinion.

The question presented is whether the First Amendment allows a regulation to target bins used to solicit donations without similarly regulating their otherwise equivalent counterparts. Two circuit courts—the Fifth and the Sixth—have held that donation bins implicate the same First Amendment interests that protect in-person solicitors. Thus, because Oakland's Ordinance singles out donation bins for regulation different from their counterparts, the City has engaged in unconstitutional content-based discrimination.

In an attempt to distinguish this case from decisions of this Court and other circuits, Oakland relies heavily on the Ninth Circuit's distinction between for-profit solicitation and non-profit solicitation. But this distinction is constitutionally meaningless under this Court's precedent.

Oakland's efforts to explain away the circuit split thus fail, as does its attempt to reconcile the decision below with this Court's precedent. Nor, finally, is there anything to Oakland's claim that this case is somehow an improper vehicle for certiorari review.

ARGUMENT

I. The Ninth Circuit's Decision Creates A Split In Lower Court Authority.

Oakland raises two arguments in an effort to explain away the split in authority. Both fail.

1. First, Oakland seeks to distinguish the Sixth Circuit's decision in *Planet Aid v. City of St. Johns*, 782 F.3d 318 (6th Cir. 2015), by claiming that the ordinance there banned donation bins entirely, while Oakland's ordinance merely regulates them.

But that factual distinction is legally irrelevant. "The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based *burdens* must satisfy the same rigorous scrutiny as its content-based *bans*." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) (emphasis added); *see, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (content-based sign restrictions subject to strict scrutiny even though they regulate signs rather than ban them). Burdens and bans both can involve the government restricting speech based on its content. That is why it was "of no moment" to the Sixth Circuit whether the ordinance in *Planet Aid* was "labeled 'complete' or 'total.'" *Planet Aid*, 782 F.3d at 331 (quoting *Playboy Entm't Grp.*, 529 U.S. at 812). The ordinance was unconstitutional because it "clearly *regulat[ed]* protected speech on the basis of its content." *Id.* at 328.

And *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202 (5th Cir. 2011), did not involve a ban. Plaintiff there successfully challenged a simple requirement that for-profit collection bin operators disclose the amount of their collections donated to each charity. *Id.* at 206. The Fifth Circuit struck this requirement down as a content-based restriction on protected speech. *Id.* at 214, 215. *Abbott* thus voided a regulatory requirement significantly less onerous than the array of burdens Oakland's ordinance imposes—and the Fifth Circuit's analysis did not turn on whether the invalid law was a complete ban or partial regulation.

What mattered in *Planet Aid* and *Abbott* was that the law was content based, just as Oakland's ordinance is here.

2. Oakland also retreads the Ninth Circuit's core error, asserting that the ordinance is not content

based because it regulates the solicitation of donations without regard to whether the solicitor acts for a "charitable or business purpose." Pet. App. 11a. But Oakland's argument, like the Ninth Circuit's, proceeds from a false premise: that solicitations by a for-profit entity are for "business purposes" while solicitations by non-profit entities are for "charitable purposes." Compare Pet. App. 6a-7a ("It does not matter *why* the UDCB operator is collecting the personal items, *whether it be for charitable purposes or for-profit endeavors*." (emphasis added)), with Opp. 14 ("[T]he Ordinance regulates Oakland's UDCBs even-handedly, without regard to whether [sic] operator is engaged in *a for-profit business or a charitable enterprise*." (emphasis added)).

According to Oakland, this supposed distinction between "business purpose" and "charitable purpose" makes this case different from *Planet Aid* and *Abbott*. But there is no First Amendment difference between solicitation by a non-profit entity and solicitation by a for-profit entity. See Pet. 14. A party's tax status says nothing about its First Amendment right to solicit a donation—to say nothing of the donor's First Amendment interests in accessing the solicitor's speech.

Thus, *Abbott* explained that for-profit collection bin operators engage in "charitable solicitations" protected by the First Amendment principles announced in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). The court in *Linc-Drop, Inc. v. City of Lincoln*, 996 F. Supp. 2d 845 (D. Neb. 2014), agreed. *Id*. at 857.

Likewise, the law struck down in *Planet Aid* is indistinguishable from Oakland's ordinance. As the Ninth Circuit acknowledged, the law in *Planet Aid* regulated *all* outdoor boxes "designed to accept donated goods or items" without regard to whether the bin operator was a for-profit or non-profit entity—just as Oakland's ordinance does. Pet. App. 9a n.3. The Sixth Circuit nevertheless voided the law. Relying on *Schaumburg*'s recognition "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," *Schaumburg,* 444 U.S. at 632, the Sixth Circuit correctly concluded the law was content based *precisely because* it did not regulate donation bins' equivalents (like trash cans) in the same way. *Planet Aid,* 782 F.3d at 328 (the law "clearly regulates protected speech on the basis of its content" because it "does not . . . regulate all unattended, outdoor receptacles" evenly).

Indeed, by focusing on a constitutionally meaningless distinction between "charitable" and "business" purposes, the City misses the distinction that matters most in this case: between donation bins—which "speak," and are thus entitled to constitutional protection, see *Planet Aid*, 782 F.3d at 325—and their equivalents, which do not, or which convey a very different message. The City's Ordinance—precisely like the one in *Planet Aid*—singles out only donation bins for a particular form of regulation. As such, it is content-based—exactly like the law in *Planet Aid*. That the Ninth Circuit came to a different conclusion only confirms that the circuits are split on this issue.

II. The Ninth Circuit Is Wrong on the Merits.

Oakland fares no better on the merits of the constitutional questions this case presents. The

Ninth Circuit's decision was contrary not only to the rulings of its sister circuits, but to the precedent of this Court.

As both the Fifth and Sixth Circuits recognized, donation bins "speak." They are "silent solicitors" implicating the same First Amendment interests as the in-person solicitors this Court found worthy of strong constitutional protections in *Schaumburg*, *Munson*, and *Riley*. *Abbott*, 647 F.3d at 213; see also *Planet Aid*, 782 F.3d at 325. The City acknowledges—indeed, stresses—that it has entirely different regulatory schemes for donation bins and their equivalents (like trash cans). Opp. 20. In other words, Oakland concedes that it treats differently, on the one hand, boxes that communicate the message "donate here for reuse" or "donate here to a charitable cause" and, on the other hand, boxes that say (effectively) "throw your trash here." Oakland argues that these disparate regulatory schemes demonstrate that its Ordinance is content-neutral when, in fact, they show the opposite. That Oakland treats donation bins—which "speak" on protected subjects—differently from all other receptacles is evidence that the Ordinance is content based.

Critically, the only way to know whether a particular receptacle is subject to one regulatory scheme or the other is for the government to examine the message on it. According to the Ninth Circuit, "that an officer must inspect a UDCB's message to determine whether it is subject to the Ordinance" does not mean the Ordinance is content based. Pet. App. 7a. But again, 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 *FCC v. League of*

Women Voters, 468 U.S. 364, 383 (1984)) (emphasis added).

In short, Oakland's Ordinance effects textbook content-based discrimination. See *Reed*, 135 S. Ct. at 2229-2230; *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

III. This Case Is An Excellent Vehicle For Resolving The Circuit Split.

As Recycle has already explained, see Pet. 23-24, it is immaterial that this case is on appeal from a preliminary injunction. The disposition of this appeal will dispose of the litigation; accordingly, the parties have agreed to stay all proceedings in the lower courts pending this Court's resolution of Recycle's petition. The dispositive issue here—whether Oakland's ordinance is a content-based restriction on protected speech—is purely legal. No additional factual record is necessary to resolve this case.

And an opinion from this Court would resolve all potential First Amendment issues arising in the donation-bin context. *Planet Aid*, *Abbott*, and *Linc-Drop* all turned on the very question that Recycle's petition presents—whether a regulation is content based when it applies only to bins engaged in charitable solicitation, regardless of whether the bin operator is a for-profit or non-profit entity. The specifics of those regulations (whether they effect complete bans, compel disclosure of for-profit status, or prohibit certain groups from using bins) are subordinate to the fundamental question of whether the regulations are content based. This case presents that foundational question, on which the lower courts are already divided.

The Ninth Circuit is the third federal appellate court to weigh in on the issue, and the decision below squarely contradicts decisions by two other courts of appeals. Both the Fifth and Sixth Circuits would

have invalidated Oakland's ordinance, and Supreme Court intervention is needed to ensure the uniform application of First Amendment rights. Now is an excellent time to resolve this question.

CONCLUSION

This Court should grant the petition.

Respectfully submitted.

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