

Case No. 16-15295

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RECYCLE FOR CHANGE,  
*Plaintiff and Appellant*

vs.

CITY OF OAKLAND,  
*Defendant and Appellee*

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On appeal from the United States District Court for the  
Northern District of California, Case No. 3:15-cv-05093  
The Honorable William H. Orrick, United States District Judge

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**BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN  
SUPPORT OF AFFIRMANCE OF DISTRICT COURT'S DENIAL OF  
PRELIMINARY INJUNCTION**

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## **I. INTRODUCTION AND STATEMENT OF INTEREST**

The League of California Cities (“League”) is an association of 474 California cities united in promoting open government and home rule to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life in California communities. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all regions of the State. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the instant matter, that are of statewide significance.

As its Legal Advocacy Committee has determined, the League and its member cities have a substantial interest in the outcome of this case. Many cities have ordinances regulating unattended donation and collection boxes (“UDCBs”) and a ruling from this Court will directly impact them. In particular, and as more fully explained below, cities would be adversely affected were this Court to accept the reasoning of Appellant Recycle for Change (“RFC”) in concluding that the ordinance of Appellee City of Oakland (“Oakland”) regulates the free-speech rights of proprietors and sponsors of UDCBs based on content.

The League sought and received the consent of the parties to file this brief. No party in this action authored this brief in whole or in part. Nor did any party or person contribute money toward the research, drafting, or preparation of this brief, which was authored entirely on a pro bono basis by the undersigned counsel.

## II. ARGUMENT

The League recognizes the benefits of UDCBs, which can provide for the redistribution of clothing and other essential items to deserving and underserved populations. However, because UDCBs collect these necessities in areas visible and open to the public, usually at all hours of the day, and often without effective monitoring and security, UDCBs have been found to be susceptible to abuses. Among other things, cities have observed that UDCBs can generate excessive calls for law enforcement services, unsightly appearances, littering, and loitering. A number of cities throughout California have thus enacted ordinances to address these impacts and other nuisances UDCBs have been known to create.

Clearly, the police power of cities to enact such ordinances is not unlimited. The League recognizes that UDCBs can do more than just collect goods or items; they also can convey charitable messages, which the First Amendment guarantees the right to express. *Village of Schaumburg v Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). Consequently, when enacting ordinances regulating UDCBs, cities must ensure they do so in a manner that does not abridge the free-speech rights of the UDCB proprietors or sponsors.

In this case, the League submits this brief because of its concerns about the sweeping position Appellant Recycle for Change (“RFC”) asserts in challenging the Oakland UDCB ordinance. Relying on the United States Supreme Court’s

decision last term in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), RFC advocates an overly broad formulation of what constitutes content discrimination that subjects an enactment to strict judicial scrutiny. If RFC's position were accepted, most, if not all, city UDCB ordinances could become suspect based on the faulty premise that regulations treating UDCBs differently than other unattended outdoor containers (such as dumpsters or recycle bins) are necessarily content based.

In *Reed*, the Court considered a First Amendment challenge to a city's sign ordinance. In summarizing the standard for determining whether the ordinance at issue was content based, and thus subject to strict scrutiny, the Court utilized a formulation that was different than had appeared in prior opinions. The Court stated, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed, supra*, 135 S.Ct. at 2227. The Court explained this standard "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.*, emphasis added.

Commentators have questioned whether *Reed*'s "on its face" formulation departs from prior precedent. See, e.g., Urja Mittal, *The "Supreme Board of Sign Review": Reed and Its Aftermath*, 125 Yale L.J. Forum 359, 360 (2016) (noting *Reed* "mark[s] a departure from the existing conception of content

discrimination.”) Writing for the Majority in *Reed*, Justice Thomas characterized the “on the face” standard as separate from that enunciated in earlier cases, which had characterized content based distinctions as involving laws that disagree with, or that cannot be justified without reference to, the content of speech. *Id.*, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Whether *Reed* now establishes the exclusive standard for determining content discrimination, or whether it supplements prior announced standards, RFC clearly views the “on the face” formulation as a foothold for its sweeping position. Just as the city in *Reed* had improperly drawn facial distinctions among various types of signs, RFC argues, so has Oakland drawn such distinctions among different types of unattended containers. The underpinning of RFC’s position is that UDCBs belong to a broad class of “outdoor receptacles.” Appellant’s Opening Brief (“AOB”) 14. RFC equates UDCBs with recycle bins and dumpsters, the only asserted difference being that UDCBs “talk”—because they convey a charitable message—while the latter are assertedly silent. AOB 15. In this respect, RFC reasons that Oakland’s different treatment of outdoor receptacles is functionally the same type of facially invalid distinction among signs the city had made in *Reed*. AOB 15.

While RFC’s syllogistic reasoning may seem appealing at first blush, it fails when put to the test. The flaw in RFC’s reasoning is the premise that UDCBs

belong in the same class as waste and recycling receptacles for purpose of content-discrimination analysis. True, all these receptacles have similar characteristics: they generally involve box-like structures, are made of material suitable for outdoor use, and are intended to hold items or things placed inside them. But beyond these superficial similarities are fundamental differences that do not allow for an “apples to apples” comparison in determining whether laws affecting UDCBs draw content-based distinctions.

Dumpsters and recycle bins generally exist to serve as repositories for the waste and refuse that commercial, office, and industrial buildings generate. They are often located in the rear of developed properties or some other location that is not immediately visible from public rights-of-way or open areas. Usually, dumpsters and recycle bins are screened with fences, gates, and locking devices. Unlike UDCBs, which *invite* passersby to come onto the property where they are located, dumpsters and recycle bins are usually *secured* from public access. Indeed, the use of dumpsters and recycled bins by persons, tenants, or businesses not associated with the property where they are located can be considered trespassing or illegal dumping, and may be punishable as a crime (even if prosecution for such matters may be rare).

In short, dumpsters and recycle bins exist simply to receive and hold discarded objects. They do no more than collect the refuse, waste, and recycled



materials generated from the owners and occupiers of the properties that have a *legal* right to use them. This is a much different function than UDCBs, which invite usage by the public at large. While UDCBs have the ability to “speak” (*Planet Aid v. City of St. Johns*, 782 F.3d 318, 326 (2015)), dumpsters and recycle bins *cannot* speak. Confined in their usual remote, screened, and secure places, and serving their *sole* purpose of storing discarded items for eventual removal, these receptacles are *inherently incapable* of conveying any message. It makes little sense, therefore, to compare these containers to UDCBs in determining whether content discrimination has occurred. Unlike in *Reed*, where there was no dispute that each of the different types of signs at issue conveyed some type of message, not all containers that comprise the broad class of “outdoor receptacles” can be said to do the same. In other words, there can be no content-based discrimination as between UDCBs on the one hand, and dumpsters and recycle bins, on the other, because there is no different content between which to discriminate. RFC’s attempt to equate Oakland’s ordinance with that which existed in *Reed* thus fails upon close examination.

The League’s request in this case is that, when this Court applies *Reed*’s facial content-discrimination standard to the facts, it decline RFC’s invitation to include UDCBs in the same class as dumpsters, recycle bins, and other waste receptacles. Beyond the superficial traits these containers share, the differences in

their respective functions and usages do not allow them to be considered as reasonably alike in analyzing content discrimination. Indeed, if the box-like construction and storage capacity of UDCBs is what qualifies them for inclusion in such a broad class, then should not other outdoor structures such as storage sheds, outdoor lockers, and even detached garages also be included? While this would be an absurd position, such would be the logical end of a method of comparison that focuses on superficial similarities between objects, rather than their respective functions and purposes, in determining whether a law discriminates on the basis of content.

The League recognizes that the two circuit courts that have addressed this subject have included UDCBs in the same class as other outdoor containers. But neither court considered why the class should be drawn so broadly. *St. Johns*, a decision of the Sixth District Court of Appeals, merely assumed that distinctions made between “unattended, outdoor receptacles” were inherently content-based. *St. Johns, supra*, 782 F.3d at 328; *id.* at. 329-30 (referring to UDCBs as “an entire subclass of physical, outdoor objects—those with an expressive message protected by the First Amendment”). And *National Federation of the Blind of Texas, Inc. v. Abbott*, a Fifth Circuit Court of Appeals decision, did not examine the nature of the class in which UDCBs belong, but instead considered whether such containers were charitable or commercial speech. 647 F.3d 202, 212-13 (2011).

This Court should decline to follow these circuits' unexamined acceptance of the notion that UDCBs belong within the same class as all outdoor receptacles. The Court should eschew the mechanical approach that RFC advocates, which focuses on identifying superficial similarities between UDCBs and other containers. Instead, the Court should employ a more meaningful analysis that considers whether other objects against which UDCBs are compared can, like UDCBs, convey a message. In *Reed*, each of the types of signs at issue possessed this characteristic, making it logical for the Court to have concluded the city's differential treatment of each sign resulted in content discrimination. Here, in contrast, while UDCBs can convey a charitable message, it strains credulity to suggest that dumpsters, recycle bins, and waste containers can do the same. To illustrate by example, a UDCB that is in the front of a parking lot and openly visible to all who pass by is clearly something different than a gated and locked dumpster located behind a shopping center and out of public view.

Applying *Reed*'s facial content-discrimination analysis in a more meaningful manner, this Court has ample grounds to affirm the District Court's determination that the Oakland ordinance does not sanction content discrimination. Here, the relevant basis for determining whether content discrimination exists should be whether Oakland similarly treats outdoor containers that are (1) accessible to the public in some manner, and (2) that communicate some message (whether

ideological, commercial, charitable, or otherwise) without differentiating between them. The ordinance at issue clearly meets this standard. As Oakland persuasively notes, its ordinance treats all UDCBs the same, regardless of the type of goods solicited, charitable message conveyed, or the profit or non-profit status of the proprietor. Appellee's Responding Brief ("RB") 26. RFC does not dispute the City on this point.

Further, contrary to RFC's suggestion otherwise (AOB 15), Oakland officials do not have to examine outdoor receptacles to determine whether they convey expressive messages and are subject to UDCB regulations. *A.C.L.U. of Nev. v. City of Las Vegas*, 466 F.3d 784, 795-96 (9th Cir. 2006) (noting that content discrimination may occur when a government official must review a message to determine if it is subject to or exempt from an ordinance). As noted above, UDCBs are usually located in open areas that invite the public to come view them, whereas dumpsters and recycling bins are often located in remote, screened, and secured locations. UDCBs also have a unique construction that both RFC's and Oakland's briefs well illustrate. (AOB 6, RB 35.) Because of their distinctive locations and appearance, UDCBs can be identified by plain sight, often from many feet away, and accordingly do not require that official discretion be exercised in identifying them by the message they convey.

In sum, the sweeping standard RFC advocates for determining whether an ordinance regulates based on content is not justified by any solid foundation. Because of their different functions and usages, treating UDCBs as akin to dumpsters and recycle bins for purposes of determining content discrimination elevates form over substance. The Oakland UDCB ordinance is broadly applicable to *all* bins or containers that solicit goods or items, regardless of the sponsoring organization's purpose, message, or profit or non-profit status. On these facts, this Court should conclude Oakland has not regulated based on content, and analyze the Oakland ordinance under intermediate scrutiny.

### **III. CONCLUSION**

For the reasons described above, the League requests that this Court affirm the District Court's denial of RFC's motion for preliminary injunction.

Dated: April 28, 2016

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the above brief is proportionately spaced, has a typeface of 14 points or more, and contains 2,222 words, which is within the 7,000-word limitation imposed for amicus briefs per Fed. R. App. P. 29(d).

Dated: April 28, 2016

COTA COLE LLP

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 28, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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