No. 24-

In the
Supreme Court of the United States

NATIONAL FEDERATION OF THE
BLIND OF TEXAS AND ARMS OF HOPE,

Petitioners,

v.

CITY OF ARLINGTON, TEXAS,
A Municipal Corporation,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of Arlington, Texas, has banned charitable donation boxes on consenting private property in 25 of 28 zoning districts in the City, foreclosing placement at churches, faith-based schools, and commercial locations where donors can see and conveniently access the boxes. Donation boxes have been used for thousands of years as an important and unique means of soliciting and receiving donations for charitable causes. Arlington has made this fully protected speech and association a crime in the 25 forbidden zones, which comprise most of the City.

The Charities seek to peacefully speak and associate with donors through donation boxes on consenting private property to build awareness for their charitable and religious causes, appeal for support of those causes, and collect much-needed charitable contributions. Yet, Arlington prohibits them from doing so.

The questions presented are:

1. Whether the most exacting scrutiny long applied by this Court to laws banning or burdening fully protected charitable solicitations applies to a ban on donation boxes.

2. Whether the court below erred by failing to properly require narrow tailoring under intermediate scrutiny.

RULE 29.6 STATEMENT

Arms of Hope and National Federation of the Blind of Texas are nonprofit corporations organized under the laws of Texas. They have no parent corporations and no publicly held company owns 10% or more of their stock.

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, Petitioners state that the following proceedings are directly related to the action that is the subject of this Petition:

United States District Court (N.D. Tex.):

Nat'l Fed'n of the Blind of Tex. v. City of Arlington, No. 3:21-CV-2028-B (Sept. 9, 2022) (granting judgment for Plaintiffs on zoning restriction, entering permanent injunction, and finding for Defendant on all remaining claims).

United States Court of Appeals (5th Cir.):

Nat'l Fed'n of the Blind of Tex. v. City of Arlington, No. 23-10034 (July 17, 2024), petition for reh'g en banc denied, Aug. 16, 2024 (reversing judgment on zoning ban, vacating permanent injunction, and finding for Defendant in all respects).

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INTRODUCTION

The Fifth Circuit has upheld, against First Amendment challenge, a ban on a longstanding form of fully protected charitable and religious solicitation—the unattended donation box. The divided court below applied the wrong standard of First Amendment review to a law restricting the solicitation of donations, violating nearly a century of this Court's precedent. It also eviscerated the narrow-tailoring prong under intermediate scrutiny, contravening *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). The impact of this free speech case reaches much farther than donation receptacles—it opens the door for cities and states to ban any medium of charitable solicitation through zoning laws or other overly broad restrictions without having to demonstrate narrow tailoring or satisfy an exacting level of First Amendment scrutiny.

Donation boxes are containers soliciting charitable contributions of used clothing and household items placed on consenting private property, often in the parking lots of grocery stores, churches, and schools. As recognized in *National Federation of the Blind of Texas v. Abbott*, 647 F.3d 202, 213 (5th Cir. 2011), a donation box communicates a charitable message and advocates for a cause, just like a silent speaker holding a sign on the side of the road. The Sixth Circuit agreed in *Planet Aid v. City of St. Johns*, 782 F.3d 318, 326 (6th Cir. 2015), explaining the fact that charitable solicitation takes the form of a donation box does not reduce the level of its protection.

However, since 2016, the City of Arlington, Texas, has banned charitable donation boxes in 25 of its 28 zoning districts. Zoning maps showed almost all of Arlington was

banned. App. 58a-59a. The City relegated donation boxes to three primarily industrial areas dotting the periphery of the City, far from churches, schools, and commercial areas where they can be seen and accessed conveniently by donors. *Id.* Based on the zoning ban, since 2016 the City has forced Petitioner Arms of Hope to remove 20 donation boxes and has denied 16 applications by the Charities.

To address specific problems the City had experienced with unregulated donation boxes—namely, overflow and litter surrounding the boxes—Arlington imposed a licensing scheme and maintenance restrictions. But then it layered on top of that licensing scheme a zoning restriction that bans this fully protected speech in most of Arlington. App. 26a. The Charities welcome reasonable permitting requirements and maintenance regulations. But they oppose the zoning ban that forecloses the majority of Arlington to this medium of fully protected speech, which destroys the viability of donation box programs and effectively silences this unique and important medium of protected speech. App. 58a-59a.

As Judge Graves explained below in dissent, "To justify the zoning provision, the city was required to 'demonstrate that alternative measures that burden substantially less speech ... fail to achieve [its] interests.'" App. 24a (quoting *McCullen*, 573 U.S. at 495). The City failed to make this showing.

Indeed, the Ordinance's non-zoning provisions already address the specific concerns raised by the City. App. 24a-27a. Rather than giving its maintenance and permitting restrictions a chance to succeed, Arlington

took a sledgehammer to this important medium of speech and association because it was easier.

The government cannot sacrifice speech for efficiency. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988). The zoning ban is gratuitous, overly broad, and unconstitutionally stifles fully protected speech and association. *See* App. 27a-28a (dissent concluding the zoning ban is not narrowly tailored and "violates the First Amendment.").

Like the dissent below, the district court correctly held the zoning restriction burdened substantially more speech than necessary to achieve the City's stated interests in maintenance and accountability. App. 59a-60a. In a grave departure from this Court's precedent, the divided panel below reversed, splitting from the Sixth Circuit and a state supreme court.

Acknowledging its split from the Sixth Circuit, the court below held that the challenged law is content neutral and applied intermediate scrutiny. Without evidence from the government that a ban in any one zone was necessary, it extended *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), to uphold the ban simply because the government said so. *See* App. 16a-18a. The court also rejected *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), which limited *Vincent* to non-important and non-unique forms of communication, all while agreeing that charitable donation boxes are fully protected speech. App. 7a, 17a-18a.

The Fifth Circuit erred in two critical ways: (1) it applied the wrong standard of scrutiny to a law restricting

charitable solicitation, in conflict with this Court's precedent and other circuit courts; and (2) it eviscerated the narrow-tailoring prong of intermediate scrutiny, contravening *McCullen* and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

The Fifth Circuit's decision means the government can impose a sweeping ban on fully protected speech just by claiming in litigation that it does not like the medium. The holding below lowers the Constitutional guardrails that have historically protected charitable speech from prior restraint, with far-reaching consequences. This erroneous holding requires immediate reversal to protect the speech and association rights of all charitable and religious organizations.

OPINIONS BELOW

The panel opinions of the United States Court of Appeals for the Fifth Circuit (App. 1a-28a) are reported at 109 F.4th 728. The opinion of the United States District Court for the Northern District of Texas (App. 29a-68a) is reported at 2022 WL 4125094.

JURISDICTION

On August 16, 2024, the court of appeals denied Petitioners' timely petition for rehearing en banc. On October 31, 2024 and December 13, 2024, Justice Alito extended the time for filing a petition for a writ of certiorari, making the petition due January 13, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides:

Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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

A. The Petitioners' charitable donation-box programs

Donation boxes are a vital, low-cost means for charities and faith-based organizations to associate with donors, build awareness for their causes, and solicit and receive contributions. App. 3a. They have been used for centuries in the Jewish and Christian religions, embodying the virtue of charity celebrated by those faiths. *See* L. Mogil, *A History of Giving*, N.Y. Times, Sept. 6, 2007.

Petitioners National Federation of the Blind of Texas and Arms of Hope (collectively, "the Charities") use donation boxes to solicit and collect donations of used clothing and household goods. The Charities use those donations to clothe the needy, serve the blind, and otherwise support their venerable missions. ROA.1196 ¶¶ 4-8, 1200-01 ¶¶ 7-9.

Arms of Hope is a faith-based charity that provides housing, necessities, counseling, education, and other services to children and single-mother families in their time of greatest need and in a Christian environment. App. 30a. Women and children often come to Arms of Hope with only the clothes on their backs, often escaping violent situations. Arms of Hope uses some of the donations received through its donation boxes to clothe its residents. Arms of Hope sells in bulk that which it does not need to create a steady, reliable revenue stream for its ministry. App. 31a. Through its donation boxes, Arms of Hope feeds and clothes the poor, makes the gift of life possible for expectant mothers, and spreads the love of Jesus Christ through its Christian message.

Petitioner National Federation of the Blind of Texas ("NFBTX") provides critical resources to families with blind or low-vision members and to the sight-impaired community at large. Dedicated to the complete integration of the blind into society, NFBTX provides an audio newspaper program to blind and low-vision Texans; educates the public about the sight-impaired community; acts as a resource to the blind and their families; and works to remove legal, economic, and societal barriers that inhibit access to employment, education, recreation, and other aspects of community life. *See* App. 30a. Like Arms of Hope, NFBTX uses donation boxes to spread its charitable message, build awareness of the challenges of low-vision community-members, and raise funds for its charitable programs. App. 31a.

Donation boxes provide donors with a convenient and accessible way to contribute to worthwhile causes. *See* Arlington Staff Report (Aug. 21, 2018), ROA.1192. For

those who cannot afford to donate money, donation boxes offer an alternative way to practice the virtue of charity. They also allow donors who wish to remain private to associate with and support causes with anonymity.

Donation boxes also benefit the environment by diverting to charity what would otherwise go to landfills. *Id.* In 2018, 11.3 million tons of textiles went to municipal landfills—which was 7.7% of all municipal solid waste sent to landfills nationwide. *See* Environmental Protection Agency, Facts and Figures about Materials, Waste and Recycling, Textiles: Material-Specific Data (Dec. 3, 2022) ("main source of textiles in municipal solid waste ... is discarded clothing").

In the proceedings below, the Charities provided undisputed evidence that other methods of soliciting used clothing and household goods are significantly more costly and less effective than donation boxes. ROA.1039-40, 1045, 1050, 1094.

The Charities do not oppose the enactment of maintenance and permitting regulations requiring that donation boxes be kept clean and tidy and providing a means of identifying operators for appropriate enforcement. App. 39a. However, this Ordinance does far more than regulate maintenance and permitting.

B. The challenged Arlington Ordinance

Arlington enacted its "Donation Boxes" Chapter of the City Code ("Donation Box Law") in 2016 and partially amended it in 2018. App. 84a-85a.

When it imposed the Donation Box Law in 2016, the City admitted it was targeting charitable solicitation. App. 75a (§ 3.03(1)). During a Municipal Policy Committee Meeting, the Committee conceded that most donation bins in Arlington were operated as charitable solicitations. ROA.1482-83. Arlington recognized that "First-amendment protection [is] guaranteed if solicited charitably," and an "outright ban" on donation bins would be unconstitutional. *Id.* Yet it banned them anyway, because that was easier than enforcing its maintenance regulations. *See* ROA.1483-84.

Arlington asserted an interest in aesthetics. The plain text of the Donation Box Law states the City's intent is "to provide efficient legal remedies for unpermitted or poorly maintained donation boxes that threaten the orderly development of the City." App. 24a-25a, 86a (§ 1.02).

Arlington singled out one area—the Community Commercial zoning district—as its particular focus. The City's "code compliance director" discussed "out-of-control proliferation of boxes—especially the 'prolific number' in the city's high-traffic Community Commercial zones": "[e]ven when donation boxes are well-maintained," he said, "they *can be* unsightly, *particularly in large numbers*." App. 25a. (emphasis added).

As the dissent below explained, however, the zoning restriction "outright bans the boxes not just from the Community Commercial zones that are the focus of the city's concerns, but also from the 577 city acres that are zoned Office Commercial and from *all* residential zones, where at least some churches are located. Those are areas where, if the boxes were properly maintained,

their presence would seem to be both appropriate and particularly useful to the Charities." App. 26a. By its ordinance, the City is in effect preventing churches from pursuing their mission of helping those in need in furtherance of their religious beliefs.

The enacted law does much more than regulate maintenance and increase accountability—it effectively bans donation boxes from most of the City. Indeed, Arlington cannot identify a single church in the 25 prohibited zones that would be allowed to place a donation box on its property under the enacted law.

There is no evidence in the record that all bins everywhere in the City are unsightly. App. 16a, 27a. On the contrary, a visual survey the City conducted before enforcing its maintenance restrictions showed that many donation boxes exhibited no maintenance issues whatsoever, including *all boxes* collecting donations for Arms of Hope. App. 25a, 59a (study "predat[ed] the Ordinance's substantial registration, GPS, contact information, disclosure, and maintenance requirements").

For its visual survey, Arlington visited only five of 28 zones. ROA.700-21. The City conducted no post-enforcement study to determine whether its maintenance requirements were sufficient to address its stated interest in regulating donation boxes, nor is there any other evidence in the record showing the zoning ban was necessary.

Thus, the City banned boxes in 25 zones without evidence of a single maintenance issue in 22 of those zones and without ever determining whether the non-zoning

provisions of the Donation Box Law were sufficient in any zone, including Community Commercial areas. *See id.*

The non-zoning provisions of the Donation Box Law already address the City's specific concerns. App. 25a. Those provisions "address[] construction problems by requiring boxes to be made of metal, limited to 120 cubic feet, and painted a single, non-fluorescent color." *Id.*; App. 90a-91a (§ 3.03(E)-(G)). They address accountability problems by requiring permitting and contact information to be displayed on the box. App. 25a, 91a ((§ 3.03(K)). They also compel a written disclosure to donors that all donations must fit within the box. App. 34a, 91a (§ 3.03(J)). They address maintenance through strong upkeep and "cleaning requirements and by imposing joint and several liability on permit holders and property owners for failure to meet those requirements." App. 25a-26a, 89a-90a (§ 3.03(C)), 93a-94a (§ 3.06(A), (C), (I)). They address placement through setback requirements, even though some are too far, and by prohibiting boxes in easements, driveways, floodplains, fire lanes, and unpaved areas. App. 26a, 91a-94a. Finally, they "address[] clustering and proliferation through the permitting requirement and by generally restricting boxes to no more than one per lot." App. 26a, 90a (§ 3.03(D)). The "visual and structural integrity of the donation box must be maintained continuously." App. 93a (§ 3.06(C)).

And the law has teeth. Violators face permit revocation, impoundment of the box and its donated contents, steep civil penalties, and criminal charges. App. 94a-95a (§ 3.07(A), (D)), App. 99a (§ 4.01(A)). For each violation, the charity and property owner face a $500 fine, and each day the violation continues is a separate offense.

Id. After only one violation, speakers must wait one year before applying for a new permit. App. 96a (§ 3.07(E)).

Relying on the zoning ban, the City has forced Arms of Hope to remove 20 donation boxes and has denied 16 permit applications from the Petitioners. ROA.1522-637, 1667, 1812. The Donation Box Law is so restrictive that between 2018 and 2022, the City received only nine permit applications. ROA.1664. The City denied most of those initially and ultimately granted just five permits during that four-year period. ROA.1355-56; ROA.1664-65. It is widely understood that donation boxes are essentially banned in Arlington.

C. Arlington's mischaracterization of the ban

Arlington plainly bans donation boxes in most of the City. App. 59a-60a. Arlington obfuscates the effect of its ban by using percentages of only *nonresidential* acreage to describe where the protected speech *is permitted*. App. 14a-15a. In fact, Arlington forecloses the protected speech by churches and faith-based schools in all residential zones. The Fifth Circuit apparently adopted the City's mischaracterization without independently reviewing the record. App. 14a-15a.

The Charities showed undisputed evidence of their desire to place donation boxes on church properties, and the record shows Arlington's *residential* zones include churches. *See* App. 26a. Arlington has shown no evidence that supports a ban on all well-maintained charitable donation boxes at churches, schools, or commercial areas in any single zone in Arlington.

D. The proceedings below

On August 26, 2021, the Charities brought suit to challenge the zoning ban.

The Charities argued that the Donation Box Law is classic subject-matter regulation, and thus content-based, because it singles out and prohibits only outdoor receptacles that communicate a particular topic—the solicitation of donations. App. 43a. The Charities showed that Arlington treats trash bins and commercial signs more favorably than this fully protected speech, allowing trash bins and commercial signs in all zones but banning donation boxes from most of them. App. 10a. Thus, strict scrutiny was required. The Charities further argued that the zoning restriction is so insufficiently tailored that it fails *any* standard of First Amendment scrutiny. They explained the Donation Box Law lacks any nexus to the City's maintenance interests because it prophylactically prohibits fully protected speech via clean and well-maintained donation boxes in 25 zones, even though ample less-restrictive alternatives are available. App. 55a-56a.

Arlington argued that the law is content neutral because it treats all donation boxes equally and does not regulate based on speaker or viewpoint. App. 38a, 50a. Thus, Arlington argued intermediate scrutiny applied. Arlington further argued its Donation Box Law passes intermediate scrutiny because it "'curtails no more speech than is necessary to accomplish its purpose' and leaves open ample alternative channels of speech." App. 56a. But Arlington provided no evidence that existing less-restrictive alternatives were insufficient to achieve its interests and, thus, why the 25-zone ban was necessary.

On September 9, 2022, the district court held the Donation Box Law was content-neutral, finding it discriminates based on location and not "the solicitation's topic, subject matter, or viewpoint." App. 45a (relying on *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 72-73 (2022)). Accordingly, the district court applied intermediate scrutiny. It nonetheless enjoined the zoning restriction, holding it "burden[s] substantially more speech than is necessary to achieve the City's legitimate goals" and thus was not narrowly tailored. App. 59a-60a (citing *Ward*, 491 U.S. at 798-99).

The district court explained that "[t]he Zoning Maps submitted by Plaintiffs show that the three zones in which donation bins are currently allowed are peripheral areas, concentrated on manufacturing and industry, where they are unlikely to be seen by potential donors." *Id.* "While the City need not show that its chosen regulation is the most narrowly tailored way of achieving its goals," the district court made clear that "a ban on donation bins in all other zoning districts—unless justified by evidence that the Ordinance's other regulations ... have proven ineffective to control bin-associated ills in those areas—is not narrowly tailored." App. 60a. The court facially invalidated the zoning restriction and found for the City on all other claims. App. 67a-68a.

On July 17, 2024, a divided panel of the Fifth Circuit reversed summary judgment for the Charities on the zoning ban and affirmed summary judgment for the City on all remaining First Amendment claims. App. 24a. Acknowledging an existing split between the Sixth and Ninth Circuits on the question of the content-neutrality of donation-box regulations, App. 8a, the court below

followed the Ninth Circuit and determined Arlington's Donation Box Law was content-neutral. The Fifth Circuit reasoned that the Donation Box Law applies to all donation boxes, "encompassing both charitable and non-charitable solicitations for donations." App. 11a.

Without any evidence that the less-restrictive provisions of the Donation Box Law were insufficient to control blight in the 25 banned zones, App. 16a, the majority below declined to conduct the narrow-tailoring analysis required under *McCullen*, 573 U.S. at 495. The majority instead accepted the City's unsupported argument, raised for the first time on appeal, that all boxes constitute "visual blight." App. 16a. With no evidence that all boxes everywhere constitute visual blight, the Fifth Circuit embraced a "because-the-government-said-so" rationale and extended *Vincent*, 466 U.S. at 810, to authorize a complete ban on an entire medium of fully protected speech. App. 7a, 16a-19a, 27a. The split panel below vacated the judgment for the Charities on the zoning restriction, upholding the Donation Box Law in full.

In dissent, Judge Graves held the zoning ban restricts substantially more speech than necessary and, thus, fails intermediate scrutiny because it is not narrowly tailored. App. 24a. He explained that the panel majority misapplied intermediate scrutiny. App. 25a-28a. "To justify the zoning provision, the city was required to 'demonstrate that alternative measures that burden substantially less speech ... fail to achieve [the government's] interests.'" App. 24a (quoting *McCullen*, 573 U.S. at 495). Here, the "record shows that those other provisions are narrowly tailored to achieve all of the city's interests. And they are substantially less speech restrictive than the zoning provision." *Id.*

Judge Graves noted the text of the Donation Box Law itself contradicts the Fifth Circuit's conclusion that all donation boxes constitute "visual blight," as does the declaration by the City's code compliance director, which stated that donation boxes *can be* unsightly in *large numbers* in *one particular area*. App. 24a-25a. Observing that the majority's holding rested entirely on *Vincent*, Judge Graves explained that the City must show evidence that "boxes anywhere, in any condition, was the problem the City sought out to address" before imposing a near-total ban on this fully protected speech. App. 27a. "But it does not." *Id.* The record "shows that boxes created *specific* problems; that the city created specific provisions to address those specific problems; and that it *also* created a zoning provision attacking the boxes much more indiscriminately." *Id.*

On August 16, 2024, the Fifth Circuit denied en banc review.

REASONS FOR GRANTING THE WRIT

I. THE STANDARD-OF-REVIEW QUESTION MERITS THIS COURT'S REVIEW.

A. The Holding Below Conflicts With This Court's Precedent Requiring The Most Exacting Scrutiny For Laws Regulating The Solicitation Of Charitable And Religious Contributions.

As this Court has long recognized, charitable appeals for support "involve 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 v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Therefore, the "[r]egulation of a solicitation must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech ... and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Riley*, 487 U.S. at 796 (internal quotations omitted) (quoting *Schaumburg*, 444 U.S. at 632; *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959-60 (1984)); *see also Meyer v. Grant*, 486 U.S. 414, 422, n.5 (1988); *Thomas v. Collins*, 323 U.S. 516, 539-41 (1945).

This Court also has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Protected association furthers "a wide variety of political, social, economic, educational, religious, and cultural ends," and "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021).

This case involves a ban on the intertwined First Amendment activities of speech and association. The standard of review for laws restricting the solicitation of donations, whether brought as speech claims or association claims, has always been the most exacting First Amendment scrutiny. *See id.* at 618; *Riley*, 487 U.S. at 800-01; *Munson*, 467 U.S. at 969; *Schaumburg*, 444 U.S. at 636-38; *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940).

In *Cantwell v. Connecticut*, this Court made clear that a regulation of solicitation that was neutral as to religion but unreasonably obstructed the collection of donations would be constitutionally objectionable. 310 U.S. at 305 (such a regulation would "constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise").

Likewise, in *Thomas v. Collins*, this Court held that the requirement to register and obtain a license in advance of communicating a charitable or religious appeal for support and collecting donations must be done "in such a manner as not to intrude upon the rights of free speech and free assembly." 323 U.S. at 540-41. That is because the simple fact that "one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking." *N.A.A.C.P. v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984).

Seminal here is the trilogy of *Schaumburg*, *Munson* and *Riley*, in which the Supreme Court thrice applied the most exacting scrutiny to laws regulating charitable solicitations, which the Court explained could include messages about religious, charitable, social, or political causes. *Riley*, 487 U.S. at 800-01; *Munson*, 467 U.S. at 969; *Schaumburg*, 444 U.S. at 636-38. In all three cases, the Court required a sufficiently substantial interest and narrowly tailored means to uphold a restriction on solicitation. *Id.*

The *Schaumburg* trilogy is black-letter law rooted in tradition, history, and precedent dating back to *Thomas*, 323 U.S. at 540-41, *Thornhill v. Alabama*, 310 U.S. 88, 97

(1940), *Cantwell*, 310 U.S. at 305, *Schneider v. State*, 308 U.S. 147, 164 (1939), and *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). Its progeny is far-reaching, nearing a century of First Amendment jurisprudence strictly protecting the solicitation of donations, which is inherently intertwined with the advocacy of causes. *See Bonta*, 594 U.S. at 618 ("First Amendment protects right to solicit charitable contributions") (citing *Schaumburg*, 444 U.S. at 633); *Meyer*, 486 U.S. at 422 n.5 ("Our recognition that the solicitation of signatures for a petition involves protected speech follows from our recognition in *Schaumburg* ... that the solicitation of charitable contributions often involves speech protected by the First Amendment and that any attempt to regulate solicitation would necessarily infringe that speech").

In *Williams-Yulee v. Fla. Bar*, this Court again affirmed that it has "applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest." 575 U.S. 433, 442 (2015) (citing *Riley*, 487 U.S. at 798); *compare United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (to satisfy strict scrutiny, the government must show the regulation is "narrowly tailored to promote a compelling Government interest").

Most recently, in *Americans for Prosperity Foundation v. Bonta*, this Court applied exacting scrutiny to a licensing law restricting the solicitation of charitable donations and the corresponding rights of speech and association. 594 U.S. at 618 (facially invalidating requirement that charity identify major donors as condition precedent to registration). While the majority

in that case split 3-3 on whether the standard should be called "exacting" or "strict" scrutiny, what is clear is that a 6-3-majority agreed that a restriction on the speech and association rights inherent in the solicitation and collection of donations required a standard stricter than intermediate scrutiny. *Compare id.* at 608-11 (Roberts, C. J., joined by Kavanaugh and Barrett, JJ., applying exacting scrutiny) *with id.* at 619-23 (concurrences by Thomas, J., and Alito, J., joined by Gorsuch, J., requiring strict scrutiny).

The split panel's decision below to apply intermediate scrutiny, and to uphold a near-complete ban on donation boxes on consenting private property based on a "government-said-so" rationale, is irreconcilable with this Court's prior precedent. That precedent requires stricter scrutiny for regulations of the solicitation and collection of donations, which inherently implicate the rights of speech and association of the organizations and donors who wish to support the causes of their choice. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone". *Riley*, 487 U.S. at 801 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

B. The Decision Below Deepens An Entrenched Circuit Split Regarding Standard Of Review.

Initially, the Fifth and Sixth Circuits followed the long line of Supreme Court precedent discussed above and applied strict scrutiny to donation-box ordinances. *See Abbott*, 647 F.3d at 213-14; *Planet Aid*, 782 F.3d at 330; *see also Linc-Drop, Inc. v. City of Lincoln*, 996 F. Supp. 2d 845, 855 (D. Neb. 2014) (holding donation boxes placed by for-profit professionals on behalf of charities are fully

protected charitable solicitations; applying strict scrutiny). However, the court below flipped the Fifth Circuit to the other side of the split. Now two circuits—the Ninth Circuit and the Fifth Circuit below—have applied intermediate scrutiny after finding donation-box laws were content-neutral. *See* App. 13a-19a; *Recycle for Change v. City of Oakland*, 856 F.3d 666, 668-70 (9th Cir. 2017).

1. The Sixth Circuit versus the Ninth Circuit and post-*Reagan* Fifth Circuit

In *Planet Aid*, the Sixth Circuit relied on *Schaumburg*, *Munson*, *Riley*, and the Fifth Circuit's earlier decision in *Abbott* to strike down a nearly identical ban on donation boxes in St. Johns, Michigan. 782 F.3d at 324-25. The *Planet Aid* Court explained 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 box may motivate citizens to donate, or inspire them "to learn more about each charity's mission in deciding which charity is consistent with his values...." *Id.*

The Sixth Circuit held the St. Johns ordinance was content-based because it regulated by topic or subject-matter. *Id.* at 328. Indeed, it did "not ban or regulate all unattended, outdoor receptacles." *Id.* To the contrary, the ordinance banned "only those unattended, outdoor receptacles with an expressive message on a particular topic—charitable solicitation and giving." *Id.* St. Johns thus treated trash and recycling bins more favorably than boxes soliciting donations for charitable, religious,

environmental, or other causes. The Sixth Circuit applied strict scrutiny, and without deciding whether the city's interest was compelling, it found the prohibition was insufficiently tailored. *Id.* at 330-31.

The Sixth Circuit's reasoning squarely applies here. If Arlington had imposed a permitting scheme for all outdoor receptacles—including those collecting trash and recycling—and restricted all receptacles' size, construction, maintenance, upkeep, placement, and clustering, then the law would have been content-neutral. Notably, such a regulation could not have included a zoning ban, because trash cans could not realistically be banned in all (or even any) zones. Thus, a content-neutral regulation would protect against such overbroad prohibitions and ensure that all receptacles are regulated reasonably. If the enacted ban is not a reasonable regulation of trash cans, it certainly is not a reasonable regulation of the solicitation and collection of charitable and religious donations.

If Arlington wants to regulate receptacles by subject matter, it certainly can, but only if it satisfies strict scrutiny. Approximately 45 states regulate the solicitation of donations, requiring registration and permitting and imposing numerous other restrictions at the state level. But those regulations are subject to strict scrutiny for the same reason Arlington's Donation Box Law is—they regulate by subject matter and thus are content-based. *See Kissel v. Seagull*, 552 F. Supp. 3d 277, 289-90 (D. Conn. 2021).

For example, in *State v. TVI*, the Supreme Court of Washington unanimously affirmed that strict scrutiny applies to the state's restriction of charitable solicitations.

1 Wn.3d 118, 129 (Wash. 2023). Following the *Schaumburg* trilogy and *Abbott*, the *TVI* Court affirmed that "[c]haritable solicitations are fully protected by the First Amendment, so the State must satisfy 'exacting' or 'strict' scrutiny to justify content-based restrictions." *Id.* (citing *Riley* 487 U.S. at 798).

Notwithstanding, the Fifth Circuit below acknowledged it split from the Sixth Circuit, *see* App. 8a, and concluded Arlington's Donation Box Law is content-neutral, relying on this Court's recent decision in *Reagan*, 596 U.S. at 69, and the Ninth Circuit's decision in *Recycle for Change*, 856 F.3d at 668-70. The Fifth Circuit reasoned that "[a] regulation that 'requires an examination of speech only in service of drawing neutral, location-based lines' and 'is agnostic as to content' is content-neutral." App. 8a. The court further reasoned that "restrictions on solicitation are not content based and do not inherently present the potential for becoming a means of suppressing a particular point of view, *so long as they do not discriminate based on topic, subject matter*, or viewpoint". *Id.* (quoting *Reagan*, 596 U.S. at 72) (emphasis added).

While acknowledging the dicta in *Reagan* about regulating solicitation, however, the court below ignored the blatant subject-matter distinction in the plain text of Arlington's Donation Box Law. *See* App. 9a, 33a ("donation box" defined as a receptacle "intended for use as a collection point for accepting *donated* textiles, clothing, shoes, books, toys, dishes, household items") *and* App. 94a (§ 3.06(I)) (a "*donation box shall only be used for the solicitation and collection of [donated] clothing and household items*.") (emphasis added). The law does not regulate only based on location. It is not agnostic as

to content. The distinction by subject matter is clear—Arlington's Donation Box Law applies *only if* a box solicits donations.

The court below overlooked other content distinctions, as well. For example, it overlooked the compelled-speech disclosure requirement in the Donation Box Law at § 3.03(J), *see* App. 91a, erroneously concluding "[t]he signage on the donation boxes is of no consequence." App. 9a; *but see* App. 13a (acknowledging compelled disclosures "necessarily alter[] the content of the speech"). Further, prohibitions on speech necessarily alter the content of the message. *Riley*, 487 U.S. at 795-801 (holding there is no constitutionally significant difference between compelled speech and compelled silence). Whether the content is mandated through disclosures or prohibited by broad, prophylactic restraints like Arlington's, the difference is constitutionally insignificant. *Id.* at 796-97. This Court applies the same strict scrutiny. *Id.*

The court below focused on the Donation Box Law's placement restrictions, ignored its content distinctions, and concluded that Arlington treats all donation boxes equally. App. 9a-11a. The court held that the Donation Box Law "'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'". App. 9a (quoting *Recycle for Change*, 856 F.3d at 672; *Reagan*, 596 U.S. at 72). Yet zoning a medium of fully protected speech out of almost an entire city based on the subject matter of the message—the solicitation of donations—is hardly a neutral time, place, or manner restriction.

The Ninth Circuit similarly ignored the subject-matter distinction in Oakland's donation-box law in *Recycle for Change*, 856 F.3d at 671. Despite recognizing "the message expressed by UDCBs [soliciting and] accepting charitable donations constitutes 'content'" and, therefore, the regulation thereof is content regulation, the Ninth Circuit erroneously determined "the activity of collecting ... personal items—or the solicitation of items to further such activity" is not "communicative content" at all. *Id.* at 671-72. The Ninth Circuit's decision in *Recycle for Change* contravened *Cantwell*, *Thomas*, and more than 80 years of this Court's precedent.

Under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) and *Reagan*, a regulation is facially content-based if it "'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *Reagan*, 596 U.S. at 69 (quoting *Reed*, 576 U.S. at 163). "Some facial distinctions *based on a message* are obvious, *defining regulated speech by particular subject matter*, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 576 U.S. at 163-64 (emphases added).

The subject-matter content distinction in Arlington's Donation Box Law is not subtle. *See Bruni v. City of Pittsburgh*, 141 S. Ct. 578, 578 (2021) (Thomas, J., concurring) (this is subject matter regulation and "strict scrutiny is the proper standard of review") (quoting *Reed*, 576 U.S. at 169)).

2. The Sixth Circuit got it right.

This case is the same as *Planet Aid* and *Reed*. Nothing in *Reagan* changes that. Unlike the off-premises signage regulation at issue in *Reagan*, the Donation Box Law is subject-matter regulation. *See Reagan*, 596 U.S. at 72. Arlington's zoning ban applies *because of* the topic or subject matter of the message—it applies only *because* a receptacle solicits donations. As in *Planet Aid*, Arlington's law prohibits outright "an entire subclass of [bins] ... with an expressive message protected by the First Amendment." 782 F.3d at 329-30. Yet, it allows trash bins in every zone, even though they have the same risks of overflow and blight. *See id.*

This Court warned in *Reagan* that a "regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject matter distinction"—i.e., charitable solicitation—for a "'function or purpose' proxy"—i.e., the solicitation and collection of donated clothing and household items—that achieves the same result. 596 U.S. at 74. That is exactly what Arlington and Oakland have done.

The donation-box laws enacted by Arlington and St. Johns are nearly identical, down to the definition of "donation box." Both define the regulated speech by subject matter—the solicitation of donations—and involve near-complete prohibitions on fully protected charitable and religious solicitations, squarely regulating the topic of charitable giving. As the Sixth Circuit confirmed in *Planet Aid*, "'it is of no moment' whether the [ban] is labeled 'complete' or 'total' because '[t]he distinction between laws burdening and laws banning speech is but a matter

of degree.'" 782 F.3d at 331 (quoting *Playboy*, 529 U.S. at 812); *see also Munson*, 467 U.S. at 969 (both are, in effect, a "before-the-fact prohibition on solicitation").

Both laws prohibit bins because they communicate a solicitation for donations, regardless whether the purpose is charitable, religious, political, social, or environmental. This is "a paradigmatic example of content-based discrimination, singl[ing] out specific *subject matter* for differential treatment, even if it does not target viewpoints within that subject matter." *Reed*, 576 U.S. at 156 (emphasis added). Strict scrutiny is due.

II. THE NARROW-TAILORING ISSUE MERITS THIS COURT'S REVIEW.

The court below erroneously applied intermediate scrutiny. Even under that standard, however, the zoning ban fails because it is not narrowly tailored. Under intermediate scrutiny, a law "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 799).

A. The Fifth Circuit Eviscerated The Narrow-Tailoring Prong Of Intermediate Scrutiny, Violating *McCullen*.

The divided panel below acknowledged it was required to follow *McCullen*'s narrow-tailoring requirements. App. 15a. To establish narrow tailoring under *McCullen*, "the city was required to 'demonstrate that alternative measures that burden substantially less speech ... fail to achieve [its] interests." App. 24a (quoting 573 U.S. at

495). In other words, Arlington had to produce evidence of why a complete ban in each of 25 zones was actually necessary. App. 60a. But the City failed to do so, and the majority below erred by not requiring that evidentiary showing in concluding the zoning ban was appropriately tailored. App. 15a-19a.

The purpose clause of the 2018 Ordinance identifies the City's interest in "provid[ing] efficient legal remedies for *unpermitted* or *poorly maintained* donation boxes." App. 24a-25a; App. 86a (§1.02) (emphases added). The 2016 Ordinance states the same, explaining the proliferation of donation boxes "for charitable purposes" had resulted in problems with maintenance and identifying persons responsible for the bins. App. 71a, 73a (Whereas clauses; § 1.02). The Staff Report accompanying the 2018 amendments explained that "the City wants to ensure" bins "are *maintained* in a manner that minimizes the risk of blight." ROA.1192 (emphasis added).

As Judge Graves and the district court found, the non-zoning provisions in Arlington's Donation Box Law already address all of the City's stated concerns without the need for the zoning ban. App. 25a-26a. The "district court did not just invent 'some less-speech-restrictive alternative' and speculate that it 'could ... adequately serve[] the city's interests." *Id.* (quotation omitted). "It examined ordinance provisions that the city itself had adopted and found them to be both narrowly tailored to the city's concerns and substantially less speech restrictive than the zoning provision." App. 25a-26a.

Those other provisions already restrict the "construction, labeling, maintenance, upkeep, signage,

color, placement, clustering, and unchecked accumulation of boxes," and they "precisely target[]" the City's stated interest in improving maintenance. *Id.* Arlington failed to provide any evidence that those less-restrictive measures are insufficient to achieve its goals in the banned areas. App. 25a. To be sure, under intermediate scrutiny, Arlington need not pick the least-restrictive means of achieving its interests. But it must show that its law does not restrict more speech than necessary.

The "zoning provision's effect is ... drastic." App. 26a. "It outright bans the boxes not just from the Community Commercial zones that are the focus of the city's concerns, but also from the 577 city acres that are zoned Office Commercial and from *all* residential zones, where at least some churches are located." *Id.* All this despite that its study—which predates its maintenance requirements—found only *some* boxes had maintenance problems, most located in Community Commercial areas. App. 59a.

The majority below counters that "allowing only one donation box per lot does little to address Arlington's proliferation concern," App. 18a, but this conclusory statement is unsupported by any record evidence. Without an evidentiary showing that other less burdensome, narrowly tailored alternatives are insufficient to achieve the legislature's interests, the majority's unsupported conclusion that the zoning provision is narrowly tailored contravenes *McCullen*. 573 U.S. at 493 ("For a problem shown to arise only once a week in one city ... creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.").

The court below eviscerated the narrow-tailoring requirement of intermediate scrutiny.

B. The Fifth Circuit Improperly Extended *Vincent*.

Rather than analyzing narrow tailoring as required under *McCullen*, the majority below condoned a "because-the-government-says-so" approach to banning protected speech.

Invoking *Vincent*, which upheld a complete ban on posting fliers on *public* property, the majority found that Arlington can ban fully protected speech on consenting *private* property without narrow tailoring simply because the government says in litigation that all donation boxes are "unsightly." App. 16a-17a (citing 466 U.S. 789 (1984)). As Judge Graves explains, that is wrong even under *Vincent*, which is inapplicable in any event. App. 27a.

First, Arlington pivoted on appeal to argue in its briefs—unsupported by the text and legislative history of the Donation Box Law—that its interest is in banning all donation boxes because they are "unsightly" when "well maintained." App. 3a, 13a, 16a. The majority below accepted that argument, even though the City provided no evidence to support that was ever the City's interest.

All the majority cited was a declaration in this litigation by the City's code enforcement director, but even that declaration does not state that all bins are "unsightly." App. 25a. Moreover, as the dissent points out, the City's own visual survey proves the opposite. *Id.* The study shows only some bins exhibited maintenance issues, and

"some boxes had no problems, including boxes collecting donations for [Petitioner Arms of Hope]." App. 25a.

The government bears the burden of proving its restrictions are narrowly tailored to its *stated* purpose. *McCullen*, 573 U.S. at 495; *Ward*, 491 U.S. at 788-89. While the City's pretextual, illegitimate goal may be to rid Arlington of donation boxes because it does not like them (which is what the zoning provision effectively does), that is not the legislature's stated purpose.

The majority below states the "dissent at 3 would require record evidence showing 'the existence of boxes anywhere, in any condition, was the problem the city set out to address' before applying ... *Vincent*." App. 16a. Judge Graves is right. *See McCullen*, 573 U.S. at 495. And there is no such evidence.

The district court likewise explained that a ban on donation boxes in 25 of 28 zoning districts is not narrowly tailored "unless justified by evidence that the Ordinance's other regulations and/or less restrictive [] limitations have proven ineffective to control bin-associated ills *in those areas*." App. 60a (emphasis added). Arlington made no such showing.

"In *Vincent*, the Court differentiated between narrowly tailored rules that 'respond[] precisely' to a city's problems and broad rules that end up 'gratuitously infring[ing] upon' protected speech. The zoning provision is an example of the latter." App. 27a (quoting 466 U.S. at 810). Had the court below correctly applied this Court's narrow-tailoring requirement, it would have found the zoning ban—by banning clean, well-maintained

charitable donation boxes in most of Arlington—prohibits substantially more speech than necessary. App. 24a-28a.

Second, *Vincent* is inapplicable. In *Gilleo*, 512 U.S. at 54, this Court limited the application of *Vincent* to mediums of speech that are not uniquely valuable and important modes of communication. App. 17a. The Charities argued "donation boxes are a uniquely valuable and important mode of communication." *Id.* As the court below recognized, charitable donation boxes are fully protected speech. App. 7a. Yet it summarily dismissed the Charities' argument, concluding that "unlike *Gilleo's* residential signs, donation boxes 'have [not] long been an important and distinct medium of expression.'" App. 17a-18a.

That is incorrect. The charity box can be traced back thousands of years in the Jewish faith. Known as "tzedakah boxes", they have historically been placed at synagogues. *See* Laura Mogil, *A History of Giving*, N.Y. Times, Sept. 6, 2007. Likewise, in the Christian faith, receptacles known as "donation boxes," "alms boxes," "poor boxes," "offertory boxes," or "mite boxes" have been placed at churches since the earliest days of the religion. Indeed, the donation box is described in an Old Testament verse relating how the First Temple in Jerusalem collected donations for its repair: "in a chest with a hole bored through the top." *Id.*; 2 Chronicles 24:8 ("King Joash commanded that a box for contributions be made. They put it outside, at the gate of the Temple of the Lord."); *see also* Luke 21:1-4 (poor widow casting her mite into the donation box).

The Widow's Mite, mosaic from Sant'Apollinare Nuovo, Ravenna. *See* Brian Kelly, *She Came, God Saw, She Conquered*, Catholicism.org (Aug. 5, 2017).

The placement of donation boxes by charities outside commercial areas in America dates back to at least 1891, with the Salvation Army's Red Kettle campaign. Ashley Williams, *In the Spirit of giving? What to know about the Salvation Army's annual Red Kettle campaign*, USA Today, Dec. 7, 2022. Historical records show that placing donation boxes in commercial areas, where they could be seen and accessed by donors, was commonplace in American cities since the late 1800s. *See* "Charity Box Opened," The Clinton Morning Age (Mar. 16, 1895) (donation box at Freund & Witzigman's shoe store was ceremoniously opened); Lawrence Daily Journal (Apr. 24, 1890) (encouraging the public to make a donation in the Hospital donation box at the post office); "A Donation Box Stolen," The Philadelphia Record (July 3, 1889) (noting

theft of a donation box at Twentieth and Tioga streets, in which contributions for the Johnstown sufferers were being deposited); *see also* "Couldn't Feel at Home," The Kentucky New Era (Mar. 25, 1881) (fictional story in 1881 Newspaper involving donation box of an orphan asylum).

While placement of donation receptacles by charities on private commercial property dates back more than 130 years, placement at synagogues, churches, and religious schools has been a common practice for centuries. Contrary to the Fifth Circuit's erroneous finding, the donation box is a "unique" and "important" medium of fully protected charitable and religious expression, and the history of donation boxes is well established.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING.

This case raises issues of exceptional First Amendment importance that will guide local legislatures across the country as they draft future laws regulating donation boxes and other mediums of charitable and religious solicitation. The Questions Presented are outcome-determinative for the Charities and their civil liberties, and they are recurring across the country.

A. The Issues Are Important.

First, had the Fifth Circuit applied strict scrutiny, which is required here, this case would have had a different outcome. Under strict scrutiny, if "a less restrictive alternative would serve the [g]overnment's purpose, [it] must use that alternative." *Playboy*, 529 U.S. at 813.

Second, if the Fifth Circuit had correctly applied intermediate scrutiny under *McCullen* and *Ward*, this case would have had a different outcome. That is because there is no ends–means fit between the government's interest in controlling maintenance-related blight and an outright ban on protected speech in 25 zones.

Third, clarification that stricter scrutiny applies, even if the Court does not reach that stricter analysis, is necessary to restore the rights of the Charities and protect their most precious civil liberties moving forward.

The decision below also warrants further review because it threatens grave harm to vital First Amendment speech and religious interests on a national scale. The Fifth Circuit's holding, which grossly misapplies *Reagan's* dicta regarding solicitation regulation, condones city-wide zoning prohibitions that ban charities and religious organizations from using any medium of speech that the government states in litigation it does not like, silencing their protected speech and freedom to associate with donors across the country.

Who is to say California will not rely on this precedent to ban the solicitation of donations via online platforms? *See* Cal. A.B. 488 (requiring online fundraising platforms to register and remove charities from their online platforms—causing them to lose significant donations—if the Attorney General's Office is negligent in timely reviewing the charities' applications for registration). Who is to say the Federal Trade Commission will not rely on this precedent to ban telephone calls soliciting donations? *See* 47 U.S.C. § 227(b)(2) (authorizing FTC regulation of certain telephone calls). What about banning a "donate

now" button on a website? *See* 01-000-150 Miss. Code R. § 2.08(A)(2) (requiring registration if a charity utilizes a "donate now" button on its website).

The resulting chill will be felt nationwide as organizations and their donors grapple with overly broad registration requirements and the attendant threats to their speech and association.

The factual record in this case highlights the dramatic consequences of the Fifth Circuit's legal errors. Not only did the majority jettison any need for narrow tailoring in concluding that all donation boxes are "visual blight," App. 16a, but it dismissed contrary evidence in the record, effectively demanding deference to self-serving, conclusory statements by the government in its litigation briefs.

By disregarding evidence of First Amendment chill and governmental overreach while deferring to Arlington's bare and belated claim of "visual blight," the Fifth Circuit laid down a precedent that eviscerates the narrow-tailoring requirement for fully protected speech and shreds the First Amendment rights of charities and religious organizations nationwide.

B. The Issues Are Recurring.

Prophylactic bans and burdens on donation boxes are proliferating across the country. The City of Los Angeles banned donation boxes in all residential zones and within 100 feet of any residentially zoned lot, thereby foreclosing most churches and faith-based schools as well as viable commercial properties. *See U'SAgain, LLC v.*

City of L.A., No. CV 24-6210-CBM-BFMx, 2024 U.S. Dist. LEXIS 161797, at *9-12 (C.D. Cal. Sep. 9, 2024). A nonprofit—U'SAgain—challenged that donation-box law and obtained a temporary restraining order. But after the decision below issued, a federal district court in Los Angeles denied the charity's motion for a preliminary injunction, and the TRO expired. *Id.* (relying on *Nat'l Fed'n of the Blind of Texas, Inc. v. City of Arlington, Texas*, 109 F.4th 728, 734-35 (5th Cir. 2024)).

The City of Marietta, Georgia also bans donation boxes in all residential zones, prohibiting placement at most churches and schools as well as some viable commercial properties like gas stations and convenience stores. *See* City of Marietta, Georgia, Zoning Ordinance, Div. 710, § 710.07(A). In Ypsilanti, Michigan, the City banned all donation boxes unless the property owner applied for an overly burdensome site plan (requiring boundary surveys, etc.) and a zoning variance to allow the donation box. *Planet Aid v. Ypsilanti Twp.*, 26 F. Supp. 3d 683, 686 (E.D. Mich. 2014). A charity—Planet Aid—challenged the restriction. *Id.* The district court denied Planet Aid's motion for preliminary injunction, holding that because the law was a partial ban and not a complete ban, strict scrutiny should not apply. *Id.* at 688, 694.

The City of West Warwick, Rhode Island, has adopted a protectionist ordinance that only allows organizations incorporated in the State of Rhode Island to place donation boxes, excluding out-of-state charities that operate charitable or religious programs in the state. *See* Town of West Warwick, Ordinance No. 2019-9 § 10-188(d)(1)(a)-(b). The ordinance also requires the charity to *own* the donation box, excluding charities that *lease* or contract for the use of their donation receptacles. *Id.* at (d)(1)(c). A

city cannot force a charity to take on the cost-prohibitive expense of purchasing bins, which would require the charity to bear the risk of loss and the additional cost of replacing those bins over time, as opposed to leasing the bins and requiring the owner or manufacturer to provide a replacement if the bin is damaged by no fault of the charity. Such a protectionist regulation is overbroad, bearing no relationship to the town's interests in public safety or the prevention of blight, and it usurps the business judgment of the charity. It prohibits protected speech.

These issues are recurring and will continue to create disparate outcomes for charities and religious organizations in the lower courts, absent this Court's immediate intervention.

IV. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE QUESTIONS PRESENTED.

The Questions Presented are well-percolated in the lower courts, which will continue to follow the erroneous decisions of the Fifth and Ninth Circuits to the detriment of charitable and religious speakers nationwide. Absent reversal, the circuit split will continue to divide. This vehicle is ideal because the issues are narrow and confined, and clarification from this Court would resolve the confusion caused by *Reagan* for lower courts analyzing prohibitions on fully protected solicitations for donations. In addition, this case offers an appropriate vehicle to overturn or limit *Vincent.*

Unless reversed, the ruling below opens the proverbial floodgates to governmental justifications of complete bans on protected speech activity and religious practices "because the government said so." This ruling opens the

door to governmental bans on any medium of charitable solicitation so long as the government states in litigation that it does not like it. If the decision below stands, subsequent challengers will be hard pressed to secure the relief necessary to ward off a city-wide (or even state-wide) prohibition on their protected speech and association while a case winds its way to this Court. These potential problems afford additional reason why this Court should use this case to take up and decide the Questions Presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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January 13, 2024

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 17, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10034

NATIONAL FEDERATION OF THE BLIND OF TEXAS, INCORPORATED, A TEXAS NONPROFIT CORPORATION; ARMS OF HOPE, A TEXAS NONPROFIT CORPORATION,

Plaintiffs-Appellees/Cross-Appellants,

versus

CITY OF ARLINGTON, TEXAS,
A MUNICIPAL CORPORATION,

Defendant-Appellant/Cross-Appellee.

July 17, 2024, Filed

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:21-CV-2028.

Before Barksdale, Southwick, and Graves, *Circuit Judges.*

Rhesa Hawkins Barksdale, *Circuit Judge*:

These cross-appeals contest the partial summary judgments granted each side, concerning Appellant's ordinance regulating donation boxes in Arlington, Texas (Arlington). Arlington claims the district court reversibly erred in concluding the ordinance violated the First Amendment by restricting the permissible location of donation boxes to three zoning districts. Cross-Appellants contest the conclusions that the ordinance was neither overbroad nor a prior restraint, and that its setback requirement was constitutional. That part of the judgment concerning the limitation on donation-box locations to certain zoning districts is VACATED and judgment is RENDERED for Arlington on that part; the balance of the judgment is AFFIRMED.

I.

The following recitation of facts is, of course, based on the summary-judgment record. It includes, *inter alia*: the ordinances; the parties' motions; the declaration of Arlington's code-compliance services director; the sworn statements and depositions of the Cross-Appellants' presidents; Arlington's visual survey of donation boxes; and its supplement to the visual survey.

Cross-Appellants National Federation of the Blind of Texas, Inc. (NFBT), and Arms of Hope (AOH) (collectively Charities) are nonprofit organizations operating in Texas. As one of several means of fundraising, the Charities partner with third-party companies to place donation boxes bearing the Charities' signage throughout the city.

The donation boxes are unattended, stand-alone receptacles that are typically about five feet wide, four feet long, and six feet tall. Commonly constructed of wood, though sometimes metal, the donation boxes are usually enclosed, with an opening on the front for receiving donated property.

The Charities' third-party partners purchase the donated items at 6.6¢ a pound ($66.00 per thousand pounds) and resell the items at for-profit thrift stores. In addition to generating revenue for the Charities, the donation boxes build awareness for, and communicate an appeal to support, their causes.

Donation boxes were, until several years ago, unregulated in Arlington. By 2015, there were nearly 100 throughout the city, with many in its center. Arlington's code-enforcement officers often fielded complaints about unmaintained donation boxes. In deliberating on potential regulation, Arlington identified numerous problems associated with the donation boxes, *inter alia*: overflowing donated items; operators' failing to maintain their boxes; scavenging in and around the boxes; accumulation of litter and glass around the boxes; and dumping of large items (*e.g.*, mattresses and couches) nearby. Additionally, Arlington considered the donation boxes unsightly, even when they were well-maintained.

In 2016, Arlington enacted an ordinance creating the "Donation Boxes" chapter of the city code. In 2018, it enacted Ordinance No. 18-044 (the Ordinance), amending the 2016 ordinance. The Ordinance makes it "unlawful

for any person to place or maintain, or allow to be placed or maintained, a donation box at any location within the City of Arlington, without a valid permit". Arlington, Tex., Ordinance 18-044 § 3.01(A) (21 Aug. 2018). The Ordinance is applicable to all donation boxes, regardless of the operator's non-profit or for-profit status. *See id.* §§ 2.01, 3.01(A). The Ordinance defines a "donation box" 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.* § 2.01.

In addition to the permitting-requirement, the Ordinance regulates donation boxes' building material, color, signage, size, upkeep, and maintenance. *See id.* §§ 3.01-.06. It requires donation-box operators to, *inter alia*: apply for a permit; place on the box the permit decal, the operator's contact information, and a notice that all donations must fit within the box; regularly collect the box's contents to prevent overflow; and keep the property around the box clean of trash and debris. *Id.* §§ 3.02-.03.

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". *Id.* § 1.02. Two sections of the Ordinance are especially at issue in this action: a zoning provision limiting the permissible placement of donation boxes to three of the city's 28 zoning districts, *id.* § 3.01(C); 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.* § 3.03(I). Between the Ordinance's enactment and spring 2022, Arlington received nine applications for permits and granted five.

After NFBT filed this action pursuant to 42 U.S.C. § 1983, the court permitted AOH's joinder. The Charities contended the Ordinance was facially unconstitutional because: its zoning provision violated the First Amendment (Count I); its setback requirement violated the First Amendment (Count II); it was overbroad (Count III); and its permit requirements operated as an impermissible prior restraint (Count IV). (The Charities also made as-applied challenges in Counts II (setback requirement) and IV (permitting-requirement). The court concluded those challenges were waived, and the Charities do not dispute that ruling on appeal.) The Charities sought declaratory and injunctive relief.

After discovery, both sides moved for summary judgment. The court granted Arlington's summary-judgment motion for Counts II—IV. For Count I (the zoning provision), however, the court concluded the provision was facially unconstitutional because it was not narrowly tailored; and it enjoined Arlington from enforcing the zoning provision against the Charities.

II.

Arlington asserts the court properly reviewed the Ordinance under the intermediate-scrutiny standard, but erred in concluding the zoning provision was not narrowly

tailored. The Charities counter that the court properly ruled the zoning provision was unconstitutional. In their cross-appeal, they assert the court erred by: not applying strict scrutiny; limiting the zoning-provision injunction to the Charities; concluding the setback requirement was constitutional; and not invalidating the Ordinance as a prior restraint.

Our court "review[s] summary-judgment rulings de novo, applying the same standard as the district court". *Nat'l Press Photographers Ass'n v. McCraw*, 90 F.4th 770, 781 (5th Cir. 2024). "Cross-motions must be considered separately, as each movant bears the burden of establishing that no genuine [dispute] of material fact exists and that it is entitled to judgment as a matter of law." *Id.* (citation omitted); *see also* Fed. R. Civ. P. 56(a).

A facial challenge to an ordinance's constitutionality is "a pure question of law". *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006). "Courts generally disfavor facial challenges". *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013). "A law implicating the right to expression may be . . . invalidated on a facial challenge if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 387 (citation omitted).

Because we hold for the following reasons that the Ordinance's contested provisions are facially constitutional, we need not address either the Charities' overbreadth claim (Count III), or whether the court erred in limiting its now-vacated injunction to the Charities.

A.

The First Amendment, applicable to municipalities vested with state authority through the Fourteenth Amendment, provides that governments "shall make no law . . . abridging the freedom of speech". U.S. Const. amend. I; *see, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Charitable solicitations are fully-protected speech; and, because the Ordinance regulates all donation boxes, including those operated by both charitable and non-charitable organizations, at least some of the donation boxes regulated by the Ordinance contain charitable solicitations. *E.g., Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632-33, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). The Ordinance, therefore, implicates protected expression and triggers First Amendment analysis. *See id.* We first consider the Charities' First Amendment challenges to the zoning provision and setback requirement.

1.

For a First Amendment challenge, the appropriate level of scrutiny depends on whether the Ordinance is content-based or content-neutral. If content-based, the Ordinance is "presumptively unconstitutional" and must survive strict scrutiny. *Reed*, 576 U.S. at 163. If content-neutral, intermediate scrutiny applies. *E.g., City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. 61, 76, 142 S. Ct. 1464, 212 L. Ed. 2d 418 (2022). In making that determination, our court engages in a two-step inquiry: first, whether the Ordinance is facially content-neutral,

e.g., *Reed*, 576 U.S. at 163; if so, second, whether the Ordinance has a content-based purpose or justification, *e.g.*, *id.* at 164.

Whether regulation of donation boxes' placement is content-neutral is a question of first impression for our court. In decisions predating the Supreme Court's content-neutrality discussion in *Reagan*, the Sixth and Ninth Circuits split on the question. *See generally Planet Aid v. City of St. Johns*, 782 F.3d 318, 322, 328-30 (6th Cir. 2015) (concluding ordinance was content-based); *Recycle for Change v. City of Oakland*, 856 F.3d 666, 668-70 (9th Cir. 2017) (concluding ordinance was content-neutral).

a.

As discussed above, we first consider facial content-neutrality. "A regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *Reagan*, 596 U.S. at 69 (alteration in original) (quoting *Reed*, 576 U.S. at 163). A regulation that "requires an examination of speech only in service of drawing neutral, location-based lines" and "is agnostic as to content" is content-neutral. *Id.* Further, "restrictions on solicitation are not content based and do not inherently present the potential for becoming a means of suppressing a particular point of view, so long as they do not discriminate based on topic, subject matter, or viewpoint". *Id.* at 72 (citation omitted).

The Ordinance prohibits the placement in certain locations of "donation box[es]": receptacles "intended for use as a collection point for accepting donated . . . items of personal property". Ordinance 18-044 §§ 2.01 (defining donation boxes), 3.01(C) (outlining permissible zoning districts), 3.03(I) (outlining setback requirement). On its face, the Ordinance regulates all donation boxes without reference to content. The signage on the donation boxes is of no consequence. *See Reagan*, 596 U.S. at 71-72. Neither does the Ordinance discriminate based on the taxable status, mission, or purpose of the person or entity placing the donation box. It specifically regulates only the manner and place of donation solicitation—*e.g.*, solicitation in the *manner* of a donation box, located in prohibited *places*.

Therefore, 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". *Recycle for Change*, 856 F.3d at 672; *Reagan*, 596 U.S. at 72. Moreover, although the Ordinance curtails solicitation by the manner of donation boxes, entities may continue to solicit donations by *all other means* in *all locations* within the city. The Supreme Court has concluded similar restrictions on only the manner or place of expressive conduct are facially content-neutral. *See, e.g., Reagan*, 596 U.S. at 71-74 (concluding regulation of off-premises signs was location-based and content-neutral); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 643, 648-50, 655, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981) (concluding ordinance prohibiting distribution of literature except in restricted area during state fair was constitutional time, place, and manner regulation).

In opposition, the Charities assert: by regulating receptacles that solicit *donations* but no others (*e.g.*, receptacles collecting trash or ballots), the Ordinance targets *charitable* solicitations and is therefore content-based. *Compare Planet Aid*, 782 F.3d at 328 (accepting assertion that ordinance "bans only those [donation boxes] with an expressive message on a particular topic—charitable solicitation and giving"), *with Recycle for Change*, 856 F.3d at 671 n.3 (critiquing *Planet Aid*). *Donated* items, however, do not have an exclusively *charitable* connotation. "[D]onate" means "[t]o give (property or money) without receiving consideration for the transfer". *Donate*, Black's Law Dictionary (11th ed. 2019). "[D]onation" means "[a] gift, esp[ecially] to a charity; something, esp[ecially] money, that someone gives to a person or an organization by way of help". *Donation*, Black's Law Dictionary (11th ed. 2019); *see also Donation*, Oxford English Dictionary (2d ed. 1989) ("The action or contract by which a person transfers the ownership of a thing from himself to another, as a free gift."). Neither party offers a definition of "charity", but it typically relates to those in need. *See Charity*, Black's Law Dictionary (11th ed. 2019) ("Aid given to the poor, the suffering, or the general community for religious, educational, economic, public-safety, or medical purposes."); *Charity*, Merriam-Webster, https://www.merriam-webster.com/dictionary/charity (last visited 5 June 2024) (defining "charity" as, *inter alia*, "generosity and helpfulness especially toward the needy or suffering"); *Charitable*, Black's Law Dictionary (11th ed. 2019) ("Dedicated to a general public purpose, usu[ally] for the benefit of needy people who cannot pay for benefits received".).

National Federation of the Blind of Texas, Inc. v. Abbott further demonstrates that donation boxes can be operated for non-charitable purposes. 647 F.3d 202 (5th Cir. 2011). In *Abbott*, the act at issue required certain disclosures from for-profit entities operating donation boxes when, *inter alia*, “none of the proceeds from the sale of the donated items will be given to a charitable organization”. *Id.* at 206 (quoting Tex. Bus. & Com. Code § 17.922(b)).

As noted, the Ordinance regulates all donation boxes, encompassing both charitable and non-charitable solicitations. It “is agnostic as to content”, and, therefore, facially content-neutral to the extent it regulates expressive activity. *Reagan*, 596 U.S. at 69.

b.

Therefore, as also discussed above, we turn to whether the Ordinance has a content-based purpose or justification. *E.g., Reed*, 576 U.S. at 164. The Charities do not contest the district court’s conclusion that the Ordinance does not.

c.

In the alternative, the Charities contend *Abbott* is binding precedent, requiring application of strict scrutiny here. Our court held in *Abbott* that Texas’ donation-box law “regulates charitable solicitations and is to be evaluated under *Riley, Munson*, and *Schaumburg*”. *Abbott*, 647 F.3d at 214; *see generally Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669

(1988); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984); *Schaumburg*, 444 U.S. 620. Under those cases, a regulation will "be sustained as constitutional under the Speech Clause 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'". *Abbott*, 647 F.3d at 213 (alterations in original) (citation omitted) (quoting *Munson*, 467 U.S. at 961). Although *Riley, Munson*, and *Schaumburg* required a stricter scrutiny in *Abbott*, their holding is inapplicable here.

First, the act in *Abbott* is distinguishable from the Ordinance. The former required, *inter alia*, for-profit entities to disclose aspects of their profit structure on the public donation boxes they operated. *Id.* at 206. Here, rather than forced disclosures, the Charities challenge the Ordinance's location restrictions and the asserted vagueness of its permit requirements.

Second, the rule announced in *Abbott* applies only to "disclosures". *See Abbott*, 647 F.3d at 212-13 ("We must first determine whether the public receptacle *disclosures* at issue are merely commercial speech, . . . or whether the *disclosures* are 'charitable solicitations' . . . . Having determined that the public receptacle *disclosures* at issue are charitable solicitations, we evaluate the constitutionality of [the act] under [strict scrutiny]." (emphasis added)). No "disclosures" are at issue here.

Third, the act in *Abbott* was, in fact, content-based. *See, e.g., Riley*, 487 U.S. at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."); *see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018) (quoting *Riley*). As noted, content-based regulations on speech are subject to strict scrutiny. *Reed*, 576 U.S. at 163.

2.

Accordingly, because the Ordinance is content-neutral, we, as also noted, analyze it under intermediate scrutiny. Content-neutral regulations are permitted when they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication". *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983); *see also Moore v. Brown*, 868 F.3d 398, 403-04 (5th Cir. 2017) (outlining same standard).

Arlington asserts the significant government interests of: protecting the public's health, safety, and welfare; safeguarding the community aesthetic; promoting the ordered appearance of developed property; and increasing the accountability of donation-box operators. *See* Ordinance 18-044 § 1.02. The Charities do not dispute these interests, and the Supreme Court has concluded they are significant. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805-07, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) ("[M]unicipalities have a weighty, essentially [a]esthetic interest in proscribing intrusive and

unpleasant formats for expression".); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (plurality opinion) (upholding city's aesthetic interest in removing billboards in part because "[s]uch [a]esthetic judgments are necessarily subjective, defying objective evaluation"); *McCullen v. Coakley*, 573 U.S. 464, 486-87, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014) (recognizing legitimacy of government's interests in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights" (citation omitted)).

As a result, the only remaining question is whether the zoning provision and setback requirement are (1) "narrowly tailored" and (2) "leave open ample alternative channels of communication". *Perry*, 460 U.S. at 45.

a.

Arlington must show the zoning provision is narrowly tailored to serve its significant government interests. *See, e.g., Moore*, 868 F.3d at 403-04 (outlining rule). The zoning provision dictates, *inter alia*: "Donation boxes shall only be permitted to be placed on real property located within the following zoning use districts in the Unified Development Code: Industrial Manufacturing (IM), Light Industrial (LI), and General Commercial (GC)". Ordinance 18-044 § 3.01(C).

For Arlington's 28 zoning districts, seven are "overlay" districts, which only include acreage already accounted for

by other districts, and four currently contain no acreage. For the remaining 17 districts, nine are residential; eight, non-residential. Arlington contends that allowing donation boxes in three of its eight non-residential zoning districts is narrowly tailored to its interests. These three districts constitute 62 percent of all non-residentially-zoned land in Arlington, comprising over 7,138 acres. The Charities respond that they seek to place donation boxes in residentially-zoned districts, particularly at churches, and the three districts where boxes are permitted are on the periphery of the city, unlikely to be seen by potential donors.

"[N]arrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation". *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (second alteration in original) (citation omitted). The Ordinance "need not be the least restrictive or least intrusive means of" promoting the governmental interest, but it may not "burden substantially more speech than is necessary to further the government's legitimate interests". *Id.* at 798-99. "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799. Most recently, the Supreme Court explained: "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier". *McCullen*, 573 U.S. at 495.

The Charities contend the zoning provision burdens substantially more speech than necessary to achieve Arlington's significant interests. *See Ward*, 491 U.S. at 798-800 (outlining narrow-tailoring rule). Arlington counters that even well-maintained donation boxes are unsightly. Meaning, to achieve its significant government interest of safeguarding the community aesthetic, it must regulate the boxes themselves.

Arlington's contention invokes *Taxpayers for Vincent* where, because "the substantive evil—visual blight—[wa]s not merely a possible by-product of the activity, but [wa]s created by the medium of expression itself", the at-issue ordinance (which banned posting signs on public property) "curtail[ed] no more speech than [wa]s necessary to accomplish its purpose". 466 U.S. at 810. The Court upheld the constitutionality of a total prohibition. *Id.* at 817. In contrast, the zoning provision continues to allow donation boxes in three zoning districts.

The partial dissent at 3 would require record evidence showing "the existence of boxes anywhere, in any condition, was the problem the city set out to address" before applying *Taxpayers for Vincent*. As explained *supra*, Arlington's asserted interests in safeguarding the community aesthetic and promoting the ordered appearance of developed property are undisputed. Additionally, the record does include evidence (as demonstrated, *inter alia*, by the partial dissent's at 1 quoting Arlington's code-compliance services director) that the donation boxes themselves constitute aesthetic harm. *See also id.* at 808 ("The plurality wrote in *Metromedia*: 'It is not speculative

to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an esthetic harm.' The same is true of posted signs." (citation omitted)); *Metromedia*, 453 U.S. at 510 (explaining, in discussing billboard ordinance, that "San Diego, like many States and other municipalities, has chosen to minimize the presence of such structures. Such esthetic judgments are necessarily subjective, defying objective evaluation" (footnote omitted)).

The Charities contend the Court narrowed the applicability of *Taxpayers for Vincent* to mediums of speech that are "not a uniquely valuable or important mode of communication" and where there is "no evidence that [speakers'] ability to communicate effectively is threatened by ever-increasing restrictions on expression". *City of Ladue v. Gilleo*, 512 U.S. 43, 54, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) (citation omitted). They assert donation boxes are a uniquely valuable and important mode of communication.

In *Gilleo*, the ordinance prohibited "homeowners from displaying any signs on their property except 'residence identification' signs, 'for sale' signs, and signs warning of safety hazards". *Id.* at 45. Particularly relevant to the Court's decision was that, unlike here, the ordinance foreclosed an entire medium of expression and left no ample alternative channels of communication. *Id.* at 55-57 ("Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."). And, unlike *Gilleo*'s residential

signs, donation boxes "have [not] long been an important and distinct medium of expression". *Id.* at 55.

Because one of the substantive evils Arlington seeks to eliminate— "visual blight"—is created in part by the donation boxes themselves, the zoning provision "curtails no more speech than is necessary to accomplish its purpose". *Taxpayers for Vincent*, 466 U.S. at 810; *see also Frisby v. Schultz*, 487 U.S. 474, 476, 485-88, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (upholding ordinance banning picketing "before or about" any residence because "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"); *H & A Land Corp. v. City of Kennedale*, 480 F.3d 336, 338 (5th Cir. 2007) (quoting *Frisby* rule). The provision is narrowly tailored. (The partial dissent at 2 contends Arlington's interest in preventing the "clustering and proliferation" of donation boxes is adequately addressed by the Ordinance's permitting-requirement and provision limiting donations boxes to one per lot. *See* Ordinance 18-044 § 3.03(D). But allowing only one donation box per lot does little to address Arlington's proliferation concern.)

The provision also "leave[s] open ample alternative channels of communication". *Moore*, 868 F.3d at 404. As discussed *supra*, the scope of the Ordinance is limited. First, the Charities may continue to place donation boxes in accordance with the Ordinance. Also, the Charities are not prohibited under the Ordinance from using *any* other method in *every* zoning district to solicit donations. Along that line, the Charities solicit donations through

other channels, including: at-home pickup services, church pickup services, magazine flyers, and store-front drop-off locations. Ample alternative channels of communication exist under the Ordinance. *See, e.g., Taxpayers for Vincent*, 466 U.S. at 812 (concluding ample alternative channels existed when ordinance did not prohibit individuals from speaking or distributing literature in location where posting signs was prohibited).

b.

Arlington must likewise show the setback requirement is narrowly tailored to serve its significant government interests and leaves ample alternative channels of communication. *See, e.g., Moore*, 868 F.3d at 403-04. The setback requirement provides: "No donation box shall be permitted within the row of parking adjacent to street right-of-way unless an existing landscape setback is present in good condition. If there is no existing landscape setback, a donation box shall not be placed less than 40 feet from the adjacent street right-of-way." Ordinance 18-044 § 3.03(I).

In seeking to avoid summary judgment on the setback issue, the Charities contend Arlington has not shown there is no genuine dispute of material fact for whether a 40-foot setback is more necessary than a smaller one. *See Ward*, 491 U.S. at 799 (explaining narrowly tailored provision may not "burden substantially more speech than is necessary"). They also maintain the district court erred in disregarding as "unsupported" the Charities' deposition testimony about the public's difficulty seeing donation boxes behind the requisite setback.

The analysis for the setback requirement is much the same as for the zoning provision. Arlington notes the setback requirement serves its significant government interests of: traffic safety; aesthetic appearance; and the safety and welfare of pedestrians, property owners, and others. Arlington presented evidence showing donation boxes were sometimes surrounded by glass and debris that posed a danger to vehicles or pedestrians.

The narrow-tailoring standard is outlined *supra*. *See, e.g., Ward*, 491 U.S. at 798-800. First, because Arlington asserts even well-maintained boxes are unsightly, the setback requirement, like the zoning provision, "curtails no more speech than is necessary to accomplish its purpose". *Taxpayers for Vincent*, 466 U.S. at 810; *see also Frisby*, 487 U.S. at 485-88; *Metromedia*, 453 U.S. at 510. Second, we hold that requiring a 40-foot setback when there is no existing landscape setback does not "burden substantially more speech than is necessary". *Ward*, 491 U.S. at 799. Finally, all of the alternative channels of communication, discussed *supra*, remain available.

The Charities contend the deposition testimony of their presidents established a genuine dispute of material fact for whether the setback requirement is narrowly tailored. The presidents explained that the requirement made it nearly impossible to find a compliant location for a bin. As noted, the district court concluded the testimony was "unsupported" and did not create a genuine issue of material fact. The Charities assert summary-judgment evidence "must be taken as true" and "viewed in the light most favorable to the party opposing the motion". *Waste*

Mgmt. of La., L.L.C. v. River Birch, Inc., 920 F.3d 958, 964 (5th Cir. 2019) (citations omitted).

NFBT's president testified in her deposition, *inter alia*, that the setback requirement "make[s] it very difficult to find a location that's visible . . . that would get our message out there". She stated her testimony was "based on the ordinance itself or [her] understanding of—of the requirements in the ordinance . . . . Just the placement requirements". Similarly, AOH's president testified in his deposition that "it's extremely difficult, if not impossible, to place a bin when you're looking at 40 feet". This testimony was based on information conveyed to him by AOH's professional fundraiser who had "found that 40 feet is way too far".

Because facial challenges are pure questions of law, and in the light of the analysis *supra*, the setback requirement is narrowly tailored, even assuming *arguendo* that the deposition testimony is competent summary-judgment evidence. *See Taxpayers for Vincent*, 466 U.S. at 810; *Frisby*, 487 U.S. at 485; *Carmouche*, 449 F.3d at 662. The presidents' deposition testimony, however, is not competent summary-judgment evidence. Neither comports with Federal Rule of Civil Procedure 56 (requiring statements to "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated"). Our court has concluded testimony is insufficient to create a genuine dispute of material fact when it is "conclusory, vague, or not based on personal knowledge". *Guzman v. Allstate Assurance Co.*, 18 F.4th

157, 161 (5th Cir. 2021). Neither president makes their statement on personal knowledge and both statements are conclusory.

B.

The Charities last contend the Ordinance's permitting-provisions constitute an unconstitutional prior restraint because several of the key terms are vague and undefined, and the provisions lack guidance on how to measure setback distances. The allegedly vague terms include "in good condition", "right-of-way", "residential dwelling use district", and "City Appeal Officer". Ordinance 18-044 §§ 3.03(I), 3.06(J), 3.09(D), 3.10.

"[T]he [Supreme] Court has long held that 'law[s] subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, [are] unconstitutional'". *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 427 (5th Cir. 2020) (third and fourth alterations in original) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969)). This is often referred to as the "unbridled discretion doctrine". *Id.* "A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992) (citation omitted). "[A] time, place, and manner regulation [must] contain adequate standards

to guide the official's decision and render it subject to effective judicial review". *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 323, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002).

The Ordinance meets that test. *Cf. Shuttlesworth*, 394 U.S. at 149-51 (ruling ordinance was prior restraint because commission could refuse parade permits when "public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused"); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769-70, 772, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (ruling ordinance was prior restraint because it authorized mayor to refuse permit for newspaper stand for reasons "deemed necessary and reasonable by the Mayor"); *Forsyth County*, 505 U.S. at 126-27, 132-33 (ruling ordinance was prior restraint because it allowed administrator to adjust mandated fee for parades without "articulated standards", "objective factors", or "explanation"). To obtain a permit under the Ordinance, an applicant need only satisfy the objective criteria provided in the Ordinance. Then, the permit "*shall* be issued by the Administrator within sixty (60) days of receipt of a completed application after determining that all the requirements of this Section are satisfied". Ordinance 18-044 § 3.03(A) (emphasis added). The Ordinance requires Arlington to notify the applicant in writing of the reason for denial or revocation and it provides an appeal process for such actions. *Id.* § 3.09.

Even if we assume vagueness in the words identified by the Charities, the Ordinance's standards "are *reasonably* specific and objective, and do not leave the decision to the whim of the administrator". *Thomas*, 534 U.S. at 324 (emphasis added) (citation omitted).

III.

For the foregoing reasons, that part of the judgment concerning the zoning provision is VACATED and judgment is RENDERED for Arlington on that part. In all other respects, and in accordance with the foregoing, the judgment is AFFIRMED.

JAMES E. GRAVES, JR., *Circuit Judge*, concurring in part and dissenting in part:

I agree in large part with the majority's careful opinion. But I would affirm the district court's conclusion that the zoning provision fails to pass intermediate scrutiny. That provision is not narrowly tailored, particularly in light of other ordinance provisions that directly address Arlington's documented concerns. I respectfully dissent from that portion of the opinion.

To justify the zoning provision, the city was required to "demonstrate that alternative measures that burden substantially less speech . . . fail to achieve [its] interests." *McCullen v. Coakley*, 573 U.S. 464, 495, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014). The "alternative measures" at issue are other provisions of Arlington's ordinance regulating donation boxes. The record shows that those other provisions are narrowly tailored to achieve all of the city's interests. And they are substantially less speech-restrictive than the zoning provision.

The record illustrates the concerns that motivated the ordinance. The ordinance itself declares that it

is "intended to provide efficient legal remedies for unpermitted or poorly maintained donation boxes." The city's code compliance director testified about out-of-control proliferation of boxes—especially the "prolific number" in the city's high-traffic Community Commercial zones. He said, "[e]ven when donation boxes are well-maintained, they can be unsightly, *particularly in large numbers*." (Emphasis added.)

There is also Arlington's 2018 box study. The study noted "[l]arge abandoned items and litter" around some boxes, an occurrence more frequent when multiple boxes were situated on one lot. The litter was worst when "[boxes] were not on a single property with a single, operating business"; when they were "placed in a back parking lot or a parking area not connected to a specific business"; and when they lacked contact information. The study noted that "litter surrounding donation bins was often not removed even when a bin is otherwise maintained." Still, some boxes had no problems, including boxes collecting donations for Arms of Hope.

Those motivating concerns are specific—namely, the construction, labeling, maintenance, placement, clustering, and unchecked accumulation of boxes. The non-zoning provisions of the ordinance precisely targets them. It addresses construction problems by requiring boxes to be made of metal, limited to 120 cubic feet, and painted a single, non-fluorescent color. It addresses labeling and accountability by requiring contact information to be displayed. It addresses maintenance through cleaning requirements and by imposing joint and several liability

on permit holders and property owners for failure to meet those requirements. It addresses placement through a setback requirement and by prohibiting boxes in easements and driveways. And it addresses clustering and proliferation through the permitting requirement and by generally restricting boxes to no more than one per lot.

The city then layered the zoning provision over the top of those targeted provisions. And the zoning provision's effect is much more drastic. It outright bans the boxes not just from the Community Commercial zones that are the focus of the city's concerns, but also from the 577 city acres that are zoned Office Commercial and from *all* residential zones, where at least some churches are located. Those are areas where, if the boxes were properly maintained, their presence would seem to be both appropriate and particularly useful to the Charities.

A "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). But the district court did not just invent "some less-speech-restrictive alternative" and speculate that it "*could* . . . adequately serve[]" the city's interests. *Id.* It examined ordinance provisions that the *city itself* had adopted and found them to be both narrowly tailored to the city's concerns and substantially less speech restrictive than the zoning provision.

The majority's analysis of the zoning provision relies on *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). There, the Supreme Court concluded that the "visual assault . . . presented by [the] accumulation of signs" on public property was "a significant substantive evil within the [c]ity's power to prohibit." *Vincent*, 466 U.S. at 807. The city's prohibition on such signs was a proper means to address that "evil." *Id.* at 808. In the majority's view here, the zoning provision is similarly justified because the city's concern about visual blight "is created in part by the donation boxes themselves." *Ante* at 15.

If the record showed that the existence of boxes anywhere, in any condition, was the problem the city set out to address, even a total ban might be allowed under *Vincent*. But it does not. It shows that boxes created *specific* problems; that the city created specific provisions to address those specific problems; and that it *also* created a zoning provision attacking the boxes much more indiscriminately.

In *Vincent*, the Court differentiated between narrowly tailored rules that "respond[] precisely" to a city's problems and broad rules that end up "gratuitously infring[ing] upon" protected speech. *Id.* at 810. The zoning provision is an example of the latter. Its substantial speech limitations are not necessary to serve the city's goals, particularly in light of other ordinance provisions that more properly "focus[] on the source of the evils the city seeks to eliminate." *See Ward*, 491 U.S. at 799 & n.7.

I would affirm the district court's conclusion that the zoning provision violates the First Amendment. Accordingly, I respectfully dissent from that part of the majority's opinion.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED SEPTEMBER 9, 2022

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:21-CV-2028-B

NATIONAL FEDERATION OF THE BLIND OF TEXAS INC., AND ARMS OF HOPE,

Plaintiffs,

v.

CITY OF ARLINGTON, TEXAS,

Defendant.

JANE J. BOYLE, UNITED STATES DISTRICT JUDGE.

September 9, 2022, Decided
September 9, 2022, Filed

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiffs National Federation of the Blind of Texas Inc. (NFBTX) and Arms of Hope (AOH) (collectively, Plaintiffs)' Motion for Partial Summary

Judgment (Doc. 50) and Defendant City of Arlington, Texas (Arlington or the City)'s Motion for Summary Judgment (Doc. 47). For the reasons given below, the Court **GRANTS IN PART** and **DENIES IN PART** both motions.

I.

BACKGROUND

This is a First Amendment freedom of speech case about unattended donation collection bins (donation bins). Plaintiffs "are charitable, nonprofit organizations operating in the State of Texas." Doc. 35, Am. Compl., ¶ 11. NFBTX is "[d]edicated to the complete integration of the blind into society . . . [and] works toward the removal of legal, economic, and societal barriers to full participation by blind people in employment, education, recreation, and all other aspects of community life." *Id.* "AOH focuses on providing a safe home and Christian environment for children and single-mother families in need . . . [so they can] avoid homelessness, poverty, abuse, and neglect." *Id.*

Both Plaintiffs partner with third-party companies to place donation bins bearing signage about Plaintiffs and their missions at various Texas locations. *Id.* ¶¶ 23, 27. The bins placed by Plaintiffs through their third-party partners "receive and collect unwanted, used clothing and household items from donors for reuse while spreading the charitable organization's mission." *Id.* ¶ 23. Plaintiffs, through the third-party partners, also collect donated goods by scheduled truck pick ups at donors' residences.

Doc. 49, Def.'s App., 314, 427.[1] The third-party partners pay Plaintiffs per-pound for the donated items and then resell the items to thrift shops. *Id.* at 326-27, 346, 353, 425. The donation bins are a source of revenue for Plaintiffs, who emphasize that the bins also perform two communicative functions: "First, they deliver a message that builds awareness about the organization's cause and, second, they communicate an appeal for support of that cause." Doc. 35, Am. Compl., ¶ 14.

While such donation bins benefit Plaintiffs, they have burdened Arlington. The bins—which are generally "unattended, stand-alone boxes, approximately six feet tall, five feet wide and four feet deep" and "typically placed in parking lots"—were "[u]ntil recently . . . unregulated in Arlington, and [their] number . . . had begun to proliferate." Doc. 48, Def.'s Br., 3-4 (citing Doc. 49, Def.'s App., 301). "By 2015, there were at least 90 unattended donation boxes[2] dispersed throughout Arlington—many in the city center." Doc. 49, Def.'s App., 301. The City's "code enforcement officers were constantly fielding complaints from business owners, property owners, and residents

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1. The appendices submitted by both parties include some documents with multiple page numbers. For clarity's sake, the Court cites to the "APP." page numbers for Defendant's Appendix (Doc. 49) and to the "APP" page numbers for Plaintiffs' Appendix (Doc. 58), but omits the APP. or APP prefixes to those page numbers.

2. Arlington's ordinance that is the subject of this dispute and Arlington's briefing refer to these receptacles as "donation boxes" while Plaintiffs term them "donation bins." In this Order, the Court will generally use the term "donation bins" but considers the terms interchangeable.

concerning littered, unmaintained, and hazardous donation boxes on their street corners, parking lots, and properties." *Id.* Common issues with the bins included overflow of items, illegal dumping, broken glass and litter near the bins, and scavenging. *Id.* Arlington found it difficult to track down donation bin owners and enforce bin-related code violations with a limited code-compliance staff. *Id.* at 302.

Arlington adopted an ordinance regulating donation bins to address these issues. After engaging with stakeholders and the public, *id.* at 110-11, 120-51, and completing "a three-month study of donation boxes and their adverse secondary effects in the City" (the Visual Survey), Doc. 48, Def.'s Br., 8; Doc. 49, Def.'s App., at 5-109, as well as a two-month supplemental survey (the Supplemental Survey), Doc. 49, Def.'s App., 217-99, Arlington enacted Ordinance 18-044, codified as the 'Donation Boxes Chapter' of the Code of the City of Arlington, Texas (the Ordinance). Doc. 49, Def.'s App., 142-51.

The Ordinance makes it "unlawful for any person to place or maintain, or allow to be placed or maintained, a donation box at any location within the City of Arlington, without a valid permit issued in accordance with this Article." Arlington, Tex., Ordinance 18-044, § 3.01(A) (Aug. 21, 2018). "'Person' includes an individual, sole proprietorship, corporation, association, nonprofit corporation, partnership, joint venture, a limited liability company, estate, trust, public or private organization, or any other legal entity." *Id.* § 2.01. "'Donation Box' means

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.*

> Section 3.01(C) (the Zoning Restrictions) restricts donation box placement to:
>
> [T]he following zoning use districts in the Unified Development Code: Industrial Manufacturing (IM), Light Industrial (LI), and General Commercial (GC). Donation boxes may also be permitted on real property zoned Planned Development with the above-referenced underlying zoning use districts. Donation boxes shall not be permitted to be placed on real property located within any other zoning use districts.

Id. § 3.01(C).

Section 3.03 sets out eleven requirements to obtain a permit. *Id.* § 3.03. One of the eleven, Section 3.03(I) (the Setback Requirement) provides that: "No donation box shall be permitted within the row of parking adjacent to street right-of-way unless an existing landscape setback is present in good condition. If there is no existing landscape setback, a donation box shall not be placed less than 40 feet from the adjacent street right-of-way." *Id.* § 3.03(I).

Sections 3.04 and 3.09 describe the permit application and appeals process (the Permitting Requirements). *Id.* §§ 3.04, 3.09. Applicants must "file a written, sworn application with the Administrator," with "[a] separate permit and application . . . required for each donation box regardless of the ownership thereof," and pay an "annual permit fee." *Id.* § 3.04 (A)-(C). "Any person denied a permit shall have the right to appeal such action in accordance with the provisions of Section 3.09." *Id.* § 3.04(D). Section 3.09 provides an administrative appeals process to be conducted by the Administrator, whose decision is appealable to the City Appeal Officer. *Id.* § 3.09. The process for the City Appeal Officer's review and decision is set forth in Section 3.10. *Id.* § 3.10. If a permit is granted, the donation bin must be maintained pursuant to the requirements of Section 3.06, which include servicing the bin, keeping it free of debris, removing any donation left outside the bin, and maintaining its structural and visual integrity. *Id.* § 3.06. The bin must also display its owner's contact information and a disclosure warning donors that donated items must fit inside. *Id.* § 3.03(J)-(K). Among other restrictions, a bin may not be placed where it will impede traffic or impair driver sightlines; block access to easements, fire hydrants, or required parking spaces; or sit within 200 feet of any residential dwelling use district or in a drainage easement or floodplain. *Id.* § 3.06.

Repeat violations of these requirements may result in permit revocation and impoundment of the offending donation bin. *Id.* § 3.07(A), (D). If a permit holder's permit is revoked, they cannot be issued another permit until after a one-year waiting period. *Id.* § 3.07(E). A violation

of the Ordinance is a misdemeanor offense punishable by fine, and the Ordinance is cumulative with other city laws. *Id.* at 9. If any part of the Ordinance is found to be unconstitutional, that part is severable. *See id.*

After the Ordinance's enactment, NFBTX filed suit on August 26, 2021, alleging that the Ordinance violates its First Amendment right to engage in charitable speech. Doc. 1, Compl. In January 2022, the Court permitted AOH's joinder and Plaintiffs filed the operative Amended Complaint. *Nat'l Fed'n of the Blind of Tex. Inc. v. City of Arlington*, 2022 U.S. Dist. LEXIS 4164, 2022 WL 93941, at *4 (N.D. Tex. Jan. 10, 2022); Doc. 35, Am. Compl.

Plaintiffs challenge the Ordinance as facially unconstitutional for four reasons: (1) as a zoning ban; (2) for imposing an unduly burdensome setback restriction; (3) as overbroad; and (4) as a prior restraint on speech. Doc. 35, Am. Compl., ¶¶ 76-112. They seek declaratory and injunctive relief under 42 U.S.C. § 1983, asking the Court to declare the Ordinance unconstitutional on these bases and to enjoin Arlington from enforcing the Ordinance. *Id.* at 1, 22. NFBTX also challenges the setback restriction as applied to NFBTX's permit applications. *Id.* ¶ 102.

After conclusion of an expedited discovery period, Plaintiffs moved for partial summary judgment "on the facial claims raised in Counts I, III, and IV of their First Amended Complaint." Doc. 50, Pls.' Mot., 1. Arlington moved for summary judgment on all four of Plaintiffs' claims. Doc. 47, Def.'s Mot., 1. The motions are fully briefed and ripe for review. The Court addresses them below.

II.

LEGAL STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he substantive law . . . identif[ies] which facts are material," and only a "dispute[] over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court must view the facts and the inferences drawn from the facts "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citation omitted).

Once the summary-judgment movant has met its burden, "the non[-]movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)(per curiam)(citation omitted). A non-movant may not simply rely on the Court to "sift through the record" to find a fact issue, but must point to specific evidence in the record and articulate precisely how that evidence supports the challenged claim. *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). Moreover, the evidence the non-movant provides must raise "more than . . . some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The

evidence must be such that a jury could reasonably find in the non-movant's favor. *Anderson*, 477 U.S. at 248. If the non-movant is unable to make such a showing, the court must grant summary judgment. *Little*, 37 F.3d at 1075.

III.

ANALYSIS

Plaintiffs move for summary judgment on three of their four declaratory judgment claims, asking the Court to find that the Ordinance is: (1) an unconstitutional content-based zoning ban on a protected form of speech, (2) an unconstitutional prior restraint, and (3) unconstitutionally overbroad.[3] Doc. 50, Pls.' Mot., 1-2; Doc. 35, Am. Compl, ¶¶ 77-91, 104-112. Arlington moves for summary judgment dismissing all four of Plaintiffs' claims with prejudice. Doc. 47, Def.'s Mot., 1.

"In analyzing a First Amendment claim, the Court first determines whether the targeted speech is protected, and, if so, what level of scrutiny applies; and second, determines whether the Ordinance survives the appropriate level of scrutiny." *Ass'n of Club Execs. of Dallas, Inc. v. City of Dallas*, 2022 U.S. Dist. LEXIS 92740, 2022 WL 1642470, at *3 (N.D. Tex. May 24, 2022) (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011)). Plaintiffs argue

3. NFBTX, individually, also asserts an as-applied challenge to the Setback Requirement. Doc. 35, Am. Compl., ¶¶ 77-112. The parties have not argued and the Court has not considered NFBTX's as-applied claim in deciding these motions.

that the Ordinance is subject to strict scrutiny "for two separate and independent reasons." Doc. 51, Pls.'s Br., 3 (citing *Baker v. City of Fort Worth*, 506 F. Supp. 3d 413, 420 (N.D. Tex. 2020)). First, they allege it is a content-based regulation. *Id.* Second, they allege it is a prior restraint on protected speech. *Id.* Arlington argues that the Ordinance is subject to intermediate scrutiny because it is content neutral. Doc. 48, Def.'s Br., 18.

Below, the Court first addresses the threshold issue of Plaintiffs' standing. Then, it considers whether the Ordinance is content based or content neutral and, finding that it is content neutral, applies intermediate scrutiny to the Zoning Restrictions and Setback Requirement. Finally, it addresses whether the Permitting Requirements are an unconstitutional prior restraint on speech.

A. ***Standing***

"[T]he requirement that a claimant have 'standing is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011) (alteration in original) (quoting *Davis v. FEC*, 554 U.S. 724, 733, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008)). Standing requires that "a claimant . . . present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Id.* at 208-09. "To prove an injury in fact sufficient 'to raise a First Amendment facial challenge, . . . a plaintiff must produce evidence of an intention to engage in a course of conduct arguably affected with a constitutional interest,

but proscribed by statute.'" *Id.* (quoting *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008)). "Specifically, plaintiffs must demonstrate a 'serious [ ] interest [ ]' in acting contrary to a statute." *Id.* (alterations in original) (quoting *Barbour*, 529 F.3d at 545 n.8)). Plaintiffs "bear the burden to demonstrate standing for each claim they seek to press." *Id.* (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)).

Arlington claims that "Plaintiffs have shown no real intent to act contrary to any provision of the Ordinance" other than the Zoning Restrictions, Setback Requirement, and Permitting Requirements, and therefore have standing to challenge only those provisions. Doc. 48, Def.'s Mot., 27-29; Doc. 54, Def.'s Resp., 21 (citing *Barbour*, 529 F.3d at 545). Arlington additionally argues that AOH has standing for only the Zoning Restrictions challenge. Doc. 48, Def.'s Mot., 28.

Plaintiffs respond that they "do not challenge any other provisions [beyond the Zoning Restrictions, Setback Requirement, and Permitting Requirements] as overbroad." Doc. 56, Pls.' Resp., 36. They claim Arlington, by its assertion that Plaintiff's standing should be limited to these three provisions, admits Plaintiffs do have standing to challenge the three. *Id.*

To begin, the Court emphasizes that even if Arlington did agree that both Plaintiffs have standing to assert these three grounds for facial unconstitutionality, standing is conferred by the Constitution, not by agreement. *Abbott*, 647 F.3d at 208.

However, both Plaintiffs have demonstrated serious interest in acting contrary to the Ordinance's Zoning Restrictions, Setback Requirement, and Permitting Requirements and therefore have standing to challenge these three provisions. AOH submitted a declaration stating that it has current contracts to place donation bins in other Texas cities and, but for the Ordinance, it (or its for-profit partner on its behalf) would place donation bins in Arlington. Doc. 52, Robertson Decl., 29-30. NFBTX submitted a declaration that the placement restrictions and permitting process have prevented its placement of bins in Arlington. Doc. 52, Crosby Decl., 25-26. While these declarations of intention alone might not "demonstrate that their 'alleged injury is actual or imminent rather than conjectural or hypothetical,'" Plaintiffs have shown more. *See Abbott*, 647 F.3d at 209 (quoting *Barbour*, 529 F.3d at 545) (finding that plaintiffs' declarations that "they are seriously interested in engaging in a course of conduct affected by" challenged provision was not sufficient to support standing).

NFBTX showed that it applied for permits under the Ordinance, was denied in part on the bases of placement and zoning, and participated in what it claims was a deficient appeals process. *See* Doc. 57, Pls.' App., Ex. I, 79-95; Doc. 58, Pls' App., Ex. I, 96-101; Doc. 58, Pls.' App., Exs. K-Q, 107-29. Therefore, NFB has standing to maintain a facial challenge the Zoning Restrictions, Setback Requirement, and Permitting Requirements.

AOH showed that it placed donation bins in Arlington in the years immediately preceding the Ordinance's

adoption, which is relevant evidence of its intent to do so again. Doc. 58, Pls.' App., Ex. U, 142-43; Doc. 59, Pls.' App., Exs. V-W, 144-204; Doc. 60, Pls.' App., Ex. W, 205-49. AOH also showed that it applied for a permit under the Ordinance and was denied in part on the basis of the Zoning Restrictions. Doc. 60, Ex. W, 254-58; Doc. 61, Ex. X, 260, 265. Though the evidence does not show that AOH's application under the Ordinance was denied on the basis of Setback Requirement, AOH was subject to that provision. So, it is neither hypothetical nor speculative that AOH might imminently be harmed by the Setback Requirement. *See Abbott*, 647 F.3d at 209.[4] Further, AOH was actually denied a permit under the licensing scheme established by the Ordinance's Permitting Requirements. Doc. 60, Ex. W, 254-58; Doc. 61, Ex. X, 260, 265. Therefore, AOH has standing to maintain a facial challenge the Zoning Restrictions, Setback Requirement, and Permitting Requirements.

For these reasons, both Plaintiffs have standing to maintain a facial challenge to the Zoning Restrictions, Setback Requirement, and Permitting Requirements. To the extent that Plaintiffs challenge any other provisions as overbroad, the Court finds that those claims are waived. *See* Doc. 56, Pls.' Resp., 36.

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4. In *Abbott*, the Fifth Circuit found that the plaintiff charities lacked standing to challenge a particular fee-disclosure provision within a Texas statute, when they were not subject to that provision because they did not have the type of fee arrangement regulated by that provision with any for-profit partner, and did not present evidence of intent to imminently enter such contracts. 647 F.3d at 209. By contrast, AOH was subject to the Ordinance's Setback Requirement though its permit application was not denied on that basis.

B. *Whether the Ordinance Is Content Based or Content Neutral*

As both parties acknowledge, charitable solicitations are fully protected speech and at least some of the bins regulated by the Ordinance are a vehicle for such solicitations. *See, e.g.*, Doc. 51, Pls.' Br., 6-7; Doc. 48, Def.'s Br., 15-19. Therefore, the Court must first determine whether the Ordinance is a content-based or content-neutral regulation. *Reagan Nat'l Adver. of Austin v. City of Austin*, 972 F.3d 696, 702 (5th Cir. 2020), *rev'd on other grounds*, 142 S. Ct. 1464, 212 L. Ed. 2d 418 (2022). If the Ordinance is content-based, "then it is 'presumptively unconstitutional' and subject to strict scrutiny." *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)). "If the [Ordinance] is content neutral, then it is subject to intermediate scrutiny." *Id.*

The Court begins by finding that the Ordinance is facially content neutral. Then, the Court examines whether the evidence shows that the Ordinance was adopted for any content-based intent or purpose and finds that it was not.

1. The Ordinance Is Facially Content Neutral

Facially, "restrictions on solicitation are not content based and do not inherently present 'the potential for becoming a means of suppressing a particular point of view,' so long as they do not discriminate based on topic, subject matter, or viewpoint." *City of Austin v. Reagan*

Nat'l Adver. of Austin, LLC, 142 S. Ct. 1464, 1473, 212 L. Ed. 2d 418 (2022) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981)). Instead, "absent a content-based purpose or justification," an ordinance that facially "examine[s] . . . speech only in the service of drawing neutral, location-based lines" and "is agnostic as to content" is content neutral and does not warrant the application of strict scrutiny. *Id.* at 1471.

Plaintiffs argue that the Ordinance is facially content based because it "explicitly targets, regulates, and limits the content and type of the speech at issue: the solicitation of donations" and therefore "targets speech based on its communicative content, i.e., what it says." Doc. 51, Pls.' Br., 17. "If the bin does not solicit donations of unwanted clothing or household items, the Ordinance does not apply." *Id.* Plaintiffs also argue that the Ordinance "defines 'donation boxes' by their function and purpose: 'any drop-off box . . . or other receptacle that is intended for use as a collection point for accepting donated . . . salvageable items of personal property'," which under *Reed* requires strict scrutiny.[5] *Id.* at 19.

Arlington responds that "the Ordinance regulates the placement and maintenance of donation boxes of any kind—for-profit, charitable or otherwise," so it is facially content neutral. Doc. 54, Def.'s Resp., 4. "Donation

5. After the parties submitted their initial briefing, the Supreme Court issued the *Reagan* decision and the parties submitted supplemental briefing in light of that new controlling authority. Doc. 72, Def.'s Suppl. Br.; Doc. 73, Pls.' Suppl. Br.

boxes are broadly and neutrally defined to include all types of receptacles to be used to collect salvageable, personal property, i.e. not trash receptacles." *Id.* "[T]he Ordinance . . . contains no discriminatory classifications, as the receptacles can belong to charities, non-profits, for-profits, and anything in between," it claims. Doc. 72, Def.'s Suppl. Br., 2.

Resolving whether the Ordinance is facially content based or content neutral first requires the Court to precisely define the regulated activity or interest and whether it concerns speech, expressive conduct, or both. *Texas v. Johnson*, 491 U.S. 397, 406, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); *see Recycle for Change v. City of Oakland*, 856 F.3d 666, 672 n.4 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 557, 199 L. Ed. 2d 437 (2017). Plaintiffs too broadly characterize the regulated activity as "the solicitation of donations" because the specific physical attributes of unattended donation bins are the regulation's subject. Arlington, Tex., Ordinance 18-044, § 1.02 (Aug. 21, 2018)). Arlington's definition of the regulated activity as "the placement and maintenance of donation boxes" comes closer but does not address the bins' communicative function as "silent solicitors." Doc. 54, Def.'s Resp., 4; *Abbott*, 647 F.3d at 212.

A precise definition of the regulated activity at issue in this case encompasses both its physical and communicative aspects, and this Court finds persuasive the one used by the Ninth Circuit in evaluating a similar ordinance: the Ordinance regulates "collecting, distributing, reusing, or recycling personal items—or the solicitation of items

to further such activity." *Recycle for Change*, 856 F.3d at 671. Thus defined, donation bin ordinances regulate both pure speech (solicitation) and potentially communicative conduct (donation, collection, recycling, and resale) related to that solicitation, each of which might have a charitable or non-charitable purpose or function. So, regulations of donation bins are not *inherently* content-based but subject to the analysis given other physical forms of solicitation.

Applying the Supreme Court's most recent guidance on this subject, *Reagan*, the Court finds that Arlington's Ordinance is facially content neutral because it does not discriminate based on the solicitation's topic, subject matter, or viewpoint, but treats bin-based signage soliciting donations *to be deposited in that location* differently from communications soliciting donations for deposit elsewhere or pickup. *See* 142 S. Ct. at 1473-74. It is a regulation of the place and manner of the solicitation and associated donative conduct, and subject to intermediate scrutiny. *Cf. id.* at 1475 (recognizing a history and tradition of regulations making "on-/off-premises" distinctions in order "to address the distinct safety and esthetic challenges posed by billboards *and other methods of outdoor advertising*") (emphasis added).

The Ordinance is therefore unlike the facially content-based restrictions at issue in two of the cases cited by Plaintiffs: *Abbott*, 647 F.3d 202; and *Baker*, 506 F. Supp. 3d 413. Doc. 51, Pls.' Br., 14, 18-23. And it is also plainly distinguishable from the donation bin ordinance at issue in *Planet Aid*, on which Plaintiffs also rely. *Planet Aid v. City of St. Johns*, 782 F.3d 318 (2015); Doc. 51, Pls.' Br., 18, 23.

Abbott involved challenges to a Texas statute requiring for-profit operators of donation bins to disclose whether the donated items would be sold for profit and the nature of their fee arrangements with benefitting charities. 647 F.3d at 206. "[R]eject[ing] Texas's characterization of the speech related to the public receptacles as mere commercial speech," and "determin[ing] that the public receptacle disclosures at issue are charitable solicitations" entitled to full First Amendment protection, the Fifth Circuit applied strict scrutiny and struck down the fee-arrangement disclosure provisions. *Id.* at 213. Critically, the statute at issue in *Abbott* was content-based because it applied only to certain types of donation-bin-based solicitations—those placed on bins operated by for-profit companies—and required specific disclosures based on the charitable or for-profit status of the speaker. *Id.* Further, the *Abbott* court was analyzing a statute that directly regulated "the speech related to the [donation receptacles]" by mandating certain disclosures, not the bins' physical attributes, placement, and location as are at issue in this case. *Id.*; *see supra* Section III(A) (limiting Plaintiffs' facial challenge to the Zoning Restrictions, Setback Requirement, and Permitting Requirements).

Likewise, *Baker*'s ordinance was facially content based because it carved out an exception for political signs from an otherwise-neutral location-based sign ordinance. *See Baker*, 506 F. Supp. at 417, 420 (discussing the ordinance's "political-or-not" distinction). The Arlington Ordinance is not like the one in *Baker* because it does not exempt certain donation bins from the location restrictions based on the type of message displayed by the bin. *See id.*; *cf.*

Watkins v. City of Arlington, 123 F. Supp. 3d 856, 864-67, 870 (N.D. Tex. 2015) (finding a generally applicable ban on panhandling in the roadway at intersections facially content neutral).

Instead, the Ordinance is almost identical to the donation bin ordinance found to be facially content neutral in *Recycle for Change. See* 856 F.3d at 668-69. Like Arlington's Ordinance, the Oakland donation bin ordinance at issue in that case "applie[d] to any unattended structure that accepts" donations of salvageable personal property, "whether it be for charitable purposes or for-profit endeavors."[6] *Id.* at 670; Arlington, Tex., Ordinance

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6. Plaintiffs seek to differentiate the Oakland ordinance from the Arlington Ordinance by focusing on the Arlington Ordinance's "*donation* boxes" language, which it claims is inherently tied to charitable donations, as compared to the Oakland Ordinance's more neutral "Unattended Donation Collection Box (UDCB)" language. Doc. 56, Pls.' Mot., 20. Defendants respond that the two ordinances' definitions of the regulated bins show that their scope and substance, if not their terminology, is "substantively identical." Doc. 64, Def.'s Resp., 12. The Court agrees with Arlington that the ordinances' definitions of the regulated bins and behavior are not meaningfully different. *Compare Recycle for Change*, 856 F.3d at 668-69 (noting that the Oakland Ordinance defined UDCBs 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") *with* Arlington, Tex., Ordinance 18-044, § 2.01 (Aug. 21, 2018) ("'Donation Box' means 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.").

18-044, § 2.01 (Aug. 21, 2018) (defining "person" and "donation box" without regard to charitable purpose or lack thereof).

Finally, the Court finds the instant case distinguishable from *Planet Aid.* In that case, the Sixth Circuit found a city's total ban on donation bins facially content-based because it "ban[ned] altogether an entire subclass of physical, outdoor objects[;] . . . those with a message about charitable solicitation and giving." 782 F.3d at 329. This Court reaches a different conclusion for two reasons.

First, the cases are factually distinguishable because Arlington's Ordinance—unlike the ordinance in *Planet Aid*—is not a total citywide ban on donation bins.[7] Plaintiffs acknowledge that the Ordinance allows bins in three "of Arlington's 28 zones," though not in the "downtown, community commercial, and mixed-use areas with retail, shopping, dining, and churches" where Plaintiffs wish to place them. Doc. 51, Pls.' Mot., 36; Doc. 56, Pls.' Resp., 6.

Second, to the extent that Plaintiffs argue that *Planet Aid* establishes that an ordinance is facially content based when it singles out one "subclass of physical, outdoor objects" (donation bins) for different regulation than "other outdoor receptacles" or "outdoor structures," the Court disagrees. *See* Doc. 51, Mot., 23 (discussing *Planet*

7. "Courts disfavor wholesale bans on types of expression protected by the First Amendment, and such bans are usually invalidated on the ground that they clearly fail a 'least restrictive means' [strict scrutiny] analysis." *Denton v. City of El Paso*, 861 F. App'x 836, 840 (5th Cir. 2021) (collecting cases).

Aid, 782 F.3d at 329). Clearly, different subclasses of outdoor structures performing different functions may require differentiated regulation. A shed is not a bin or a billboard. Recognizing this reality, *Reagan* permits reasonable regulation of the physical characteristics (time, place, and manner) of fully protected solicitations so long as the regulations do not discriminate based on *the solicitation's* topic, subject matter, or viewpoint. *See* 142 S. Ct. at 1473-74. As explained above, this Court finds that the Ordinance does not discriminate against solicitations of charitable donations of goods—which would be a content-based distinction—but regulates speech soliciting donated goods (charitable or not) for physical collection in a certain place and manner.

For all these reasons, the Ordinance is facially content neutral.

2. The Ordinance Does Not Have a Content-Based Purpose or Justification

A facially content-neutral regulation may also be found to be content based and subject to strict scrutiny if it has a content-based purpose or justification.[8] *Reagan*, 142 S. Ct. at 1474.

8. This is the reverse of the secondary-effects cases discussed and abrogated in the Fifth Circuit's *Reagan* opinion, 972 F.3d at 703(discussing cases in which the Fifth Circuit "held that '[a] statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech'" (citing *Asgeirsson v. Abbott*, 696 F.3d 454, 459-60 (5th Cir. 2012)); *see also Ass'n of Club Execs. of Dall., Inc.*, 2022 U.S. Dist. LEXIS 92740, 2022 WL 1642470, at *5 (discussing the current state of secondary-effects caselaw in this circuit).

Arlington argues that there is "no evidence that Arlington adopted the Ordinance because it disagreed with the messaging of NFB[TX], AOH, or any other charity that may seek to place a donation box in Arlington" and that its purpose is addressing blight and public safety. Doc. 48, Def.'s Br., 17 (citing *Reed*, 576 U.S. at 164). Arlington points to summary-judgment evidence including an "extensive study of the issues that accompany donation boxes and their root causes, . . . [and a] thorough deliberative process in considering and crafting the Ordinance" to show that the purpose and justification of the Ordinance concerns secondary effects, not content. *Id.*; *see* Doc. 49, Def.'s App., 5-119, 217-99.

Plaintiffs respond that "Arlington grossly mischaracterizes and exaggerates the [bins'] negative effects" by "showcasing photographs of the wors[t] examples of illegal dumping, generalizing those occurrences to all donation bins and all charities, and passing them off as everyday occurrences . . . . [when this] is not an accurate picture of donation bins in Arlington." Doc. 56, Pls.' Resp., 8-9. Arlington's Visual Survey study is "woefully deficient for purposes of establishing narrow tailoring under any level of First Amendment scrutiny," they allege.[9] *Id.* at 9.

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9. Plaintiffs also argue that "the lesser scrutiny afforded regulations targeting . . . secondary effects . . . ha[ve] no application to content-based regulations," so the Ordinance's justification is irrelevant. *Id.* at 15 (first citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986); then citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976); and then citing *United States v. Playboy Ent. Grp.*

The Court finds that the Ordinance does not have a content-based purpose or justification but is concerned with controlling donation bins' negative secondary effects. Though Plaintiffs challenge the sufficiency of Arlington's Visual Survey to show narrow tailoring and claim that Arlington overstates the severity of the bins' secondary effects, they do not assert that the Ordinance's stated purpose and justification are pretextual. *See* Doc. 56, Pls.' Resp., 15. More to the point on summary judgment, they do not present or point to evidence of such. *See Ragas*, 136 F.3d at 458. Instead, the summary-judgment evidence shows that the Ordinance's purposes are civil beautification, controlling blight, and preventing safety issues incident to dumping at donation bins. *See* Doc. 49, Def.'s App., 5-109; 142-43; 217-99, 302.

So, the Ordinance is both facially and in fact content neutral. Therefore, intermediate scrutiny applies. *See Reagan*, 142 S. Ct. at 1474.

C. ***Intermediate Scrutiny Analysis***

"[C]ontent-neutral regulations of 'time, place, and manner of expression' . . . are permitted when they are 'narrowly tailored to serve a significant government

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Inc., 529 U.S. 803, 815, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000)). Since the Court finds the Ordinance facially content-neutral, the government's justification and aim in enacting the Ordinance remain relevant. *See Reagan*, 142 S. Ct. at 1474; *Reed*, 576 U.S. at 167; *see also* Doc. 56, Pls.' Resp., 15-16 (noting that "*Ward [v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)] *only* applies if a law is content-neutral on its face").

interest, and leave open ample alternative channels of communication.'"[10] *Serv. Emps. Int'l Union, Loc. 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)).

The Court first considers whether the summary-judgment evidence shows that the Ordinance serves a significant government interest, then whether it is narrowly tailored. The Court finds that the Ordinance does advance significant government interests, the Zoning Restrictions are not narrowly tailored, and the Setback Requirement is narrowly tailored.

1. Substantial Government Interest

Arlington argues that well-settled law establishes that "[a] municipality may regulate expressive conduct in a

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10. Though the Ordinance regulates placement of donation bins on private property, both parties cite caselaw that either considers speech restrictions in public fora or does not draw a distinction. *Eg.*, Doc. 48, Def.'s Mot., 15 (citing *Reed*, 576 U.S. at 163) (addressing an ordinance that "prohibit[ed] the display of outdoor signs anywhere within the Town without a permit," without distinguishing between public and private property). Plaintiffs argue that "[t]he Supreme Court has ruled that the government is similarly restricted by the First Amendment in its ability to regulate speech on private property" as on public, so the public/private property distinction does not matter. Doc. 56, Pls.' Resp., 29 n.15 (citing *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 165-66, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002)). The Court agrees that the private/public property distinction does not affect the analysis in this case. *Cf. Reagan*, 142 S. Ct. at 1475-76 (directing the lower court to apply the public fora intermediate scrutiny analysis to an ordinance that regulated, in part, signs located on private premises).

public forum to protect public health, safety, and welfare." Doc. 48, Def.'s Br., 19 (citing *Beckerman v. City of Tupelo*, 664 F.2d 502, 509 (5th Cir. 1981)). "The concept of the public welfare is broad and inclusive," encompassing aesthetic and economic concerns, and "[e]ven aesthetic conditions justify reasonable time, manner and place restrictions on speech," Arlington asserts. *Id.* (first quoting *Berman v. Parker*, 348 U.S. 26, 33, 75 S. Ct. 98, 99 L. Ed. 27 (1954); then citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981); and then citing *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 817, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)). Arlington claims that precedent establishes that the interests behind this Ordinance—which "aims to reduce or eliminate blight, illegal dumping, scavenging, and other well-documented hazards to property owners, pedestrians, and the general public caused by the proliferation of unattended and unregulated donation boxes"—are substantial. *Id.* at 20 (first citing *Metromedia*, 453 U.S. at 507-08; and then citing *Recycle for Change*, 856 F.3d at 674). Plaintiffs do not challenge Arlington's characterization of the asserted interests as substantial. *See* Doc. 56, Pls.' Resp., 28-34 (addressing only overbreadth and tailoring for intermediate scrutiny).

In support of its contentions, Arlington submits evidence including the Visual Survey and Supplemental Visual Survey, Doc. 49, Def.'s App., 5-109, 217-99. These document potentially hazardous or unsightly conditions associated with donation bins located in Arlington between January and July 2018, before the Ordinance's adoption. *Id.*

The Court finds that Arlington has a substantial interest in combating blight, controlling illegal dumping, and protecting property owners, pedestrians, and drivers from safety hazards related to uncontrolled, poorly maintained, or hazardously-sited donation bins. *See Recycle for Change*, 856 F.3d at 674 (government's interest in "combat[ing] blight, illegal dumping, graffiti, and traffic impediments that endanger drivers and pedestrians" related to donation bins is substantial); *see also, e.g., Watkins*, 123 F. Supp. 3d at 867 (government interest in pedestrian and traffic safety is substantial); *Lauder, Inc. v. City of Houston*, 751 F. Supp. 2d 920, 934 (S.D. Tex. 2010), *aff'd*, 670 F.3d 664 (5th Cir. 2012) (government's interest in pedestrian safety and aesthetics is substantial); *RTM Media, L.L.C. v. City of Houston*, 518 F. Supp. 2d 866, 875 (S.D. Tex. 2007), *as amended on clarification sub nom. RTM Media LLC v. City of Houston*, 2007 U.S. Dist. LEXIS 96656, 2007 WL 5006527 (S.D. Tex. Oct. 16, 2007) (government's interest in "reducing and preventing 'billboard blight' for reasons of aesthetics, traffic safety, and property values" is substantial).

2. Narrowly Tailored

"In the context of intermediate scrutiny, narrow tailoring does not require that the least restrictive means be used. As long as the restriction promotes a substantial governmental interest that would be achieved less effectively without the restriction, it is sufficiently narrowly tailored." *Moore v. Brown*, 868 F.3d 398, 404 (5th Cir. 2017) (quoting *Serv. Emps. Int'l Union*, 595 F.3d at 596). However, the regulation must not "burden

substantially more speech than is necessary to achieve the government's legitimate interests." *Ward*, 491 U.S. at 798-99.

i. Zoning Restrictions

First, Plaintiffs argue that the Ordinance is not narrowly tailored because it completely bans bin-based solicitations and associated donative conduct from twenty five of Arlington's twenty eight zoning districts. Doc. 51, Pls.' Br., 36-42 (discussing the Zoning Restrictions under strict scrutiny); Doc. 56, Pls.' Resp., 31-34 (discussing the Zoning Restrictions under intermediate scrutiny). Plaintiffs claim that the Supreme Court's opinion in *McCullen v. Coakley*, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014), shows that the Ordinance fails intermediate scrutiny because it "carve[s] out a chunk of space where no First Amendment activity [is] allowed" and both "'impose[s] serious burdens on [Plaintiffs'] speech' . . . and . . . 'burden[s] substantially more speech than necessary to achieve the [government's] asserted interests.'" Doc. 56, Pls.' Resp., 29 (quoting *McCullen*, 573 U.S. at 487, 490). The three zones—"Industrial Manufacturing (IM), Light Industrial (LI), and General Commercial (GC)"—in which bins are allowed are low-traffic industrial and manufacturing zones on the "periphery of the City" where Arlington residents are unlikely to see the messages, they say. Doc. 51, Pls.' Br., 36-37.

Plaintiffs further argue that the Zoning Restrictions "lack[] nexus" because the they "do[] not ensure that

the bins are maintained in a manner that minimizes blight in any 'direct and material way'" but "protect against hypothetical future maintenance violations" by prophylactically prohibiting speech though less-restrictive alternatives are available. *Id.* at 37-39 (discussing *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 670 (E.D. La. 2017)). The alternatives Plaintiffs suggest are allowing bins in the presently "forbidden commercial areas" and seeing if the Ordinance's maintenance requirements and system of fines and violations for permit holders who violate those requirements are effective in preventing the targeted ills, or considering "weekly pick-ups and bin inspections for all outdoor containers." *Id.* at 39-41.

Arlington responds that the Ordinance satisfies intermediate scrutiny because it "curtails no more speech than is necessary to accomplish its purpose" and leaves open ample alternative channels of speech by allowing "donation boxes in over 62% of all non-residentially-zoned land in the City, an area comprising over 7,138 acres." Doc. 48, Def.'s Br., 10-11, 21 (emphasis omitted). "By way of comparison, there are four non-residential zones in which donation boxes are not permitted: Community Commercial (3,578.5 acres), Downtown Business (105.8 acres), Limited Office (1.5 acres), and Office Commercial (576.8 acres) . . . . These zones account for approximately 37% of all non-residentially zoned land in the City."[11]

11. Arlington asks the Court to take judicial notice of Article 2 of its Unified Development Code (UDC), which establishes the city's zoning. Doc. 48, Def.'s Br., 10 n.9. The UDC is a publicly available document accessible on the City of Arlington's website at: https://www.arlingtontx.gov/city_hall/departments/planning_

Doc. 48, Def.'s Br., 11 n.10. Arlington explains that the permitted zones were chosen because the businesses and parking lots in those zones have "space to accommodate donation boxes without impeding traffic, both on and off street." Doc. 54, Def.'s Resp., 20.

There is evidence to support both parties' positions. The City's evidence shows that before the Ordinance's enactment some donation bins in the prohibited commercial zones were poorly maintained by their operators, were the targets of scavenging and illegal dumping, and posed a hazard to passers-by and vehicles. *See generally* Doc. 49, Def.'s App., 5-109, 217-99. Arlington's Code Compliance Services Manager, Brian Daugherty, submitted a declaration averring that many of the unsightly and hazardous bins documented in the Visual Survey and Supplemental Survey were located "in the Community

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development_services/land_development/zoning__unified_development_code/unified_development_code. The Court finds that it may take judicial notice of Article 2 of the UDC. *See* Fed. R. Evid. 201.

Regarding the UDC, Arlington states that "[n]ine of Arlington's 28 zones are residential . . . and two are mixed use," meaning they permit both commercial and residential uses, and that Plaintiffs do not wish to place donation bins in the residential zones. Doc. 40, Def.'s Br., 10 n.9 (citing Arlington, Texas, UDC, art. 2, § 2.1.2 (2021)). While Plaintiffs admit that they do not wish to place bins on residential property, Doc. 49, Def.'s App., 321; 430; they clarify that they do desire to place donation bins on non-residential (church) properties in residential zones, Doc. 56, Pls.' Resp., 12 (citing Doc. 49, Def.'s App., 430-31), presumably including partly residential mixed-use zones. *See* Doc. 51, Pls.' Br., 1 (including mixed-use areas in the list of high-traffic areas where Plaintiffs claim their speech is suppressed).

Commercial zoned areas that comprise the city center." *Id.* at 302. Daugherty also declares that "[t]he [Ordinance's] limitation on placement of donation boxes to specific zones in the City [has] greatly assisted with code compliance." *Id.* at 303. Further, the record contains evidence that bins are currently allowed "in over 62% of all non-residentially-zoned land in the City, an area comprising over 7,138 acres," so even with the Zoning Restrictions there are many locations in which bin-based solicitations and associated conduct are permitted. *Id.* at 303.

Plaintiffs present Zoning Maps showing that IM-zoned properties, which make up most of the acreage in which bins may be located, are largely located at the City's periphery, while the smaller LI and CG-zoned properties are likewise clustered in a few areas. Doc. 52, Pls.' App., 4-5. But they do not present evidence of pedestrian or vehicle traffic in those areas to support their assertion that these zones are low traffic. Next, Plaintiffs point to the Ordinance itself as evidence that the Zoning Restrictions burden substantially more speech than necessary. Doc. 51, Pls.' Br., 36; Doc. 56, Pls.' Resp., 32. They argue that the Ordinance's "registration, disclosure requirement, and written authorization of the property owner" provisions, found at Section 3.03(A),(J), and (K), address the need for identification and are less intrusive than the zoning restriction. Doc. 56, Pls.' Br., 33; Arlington, Tex., Ordinance 18-044, § 3.03(A), (J)-(K) (Aug. 21, 2018). Plaintiffs also point to evidence that the City has granted only five permits since the Ordinance's adoption and has issued no violations for those bins. Doc. 56, Pls.'s Resp., 33; Doc. 49, Def.'s App., 286. Finally, they argue that

the Visual Survey predates the Ordinance and that the City's post-Ordinance evidence, Daugherty's Declaration, states that "illegally placed donation boxes," remain an issue, not that the City faces "a present problem of illegal dumping, litter or trespass associated with donation bins." Doc. 56, Pls.' Resp., 33 (quoting Doc. 49, Daughtery Decl., 302). Plaintiffs each aver that they believe the Zoning Restrictions "interrupt our message and destroy the viability of [their] solicitation campaigns" in the City. Doc. 52, Pls.' App., 25, 31.

Examining the summary-judgment record, the Court finds that a fact question remains about whether Arlington's legitimate goals of preventing blight, illegal dumping and scavenging, and public safety would be achieved less effectively without the current Zoning Restrictions. *See Moore*, 868 F.3d at 404. The City's Visual Survey documents a significant problem with bins in the now-prohibited Community Commercial zones, but it predates the Ordinance's substantial registration, GPS, contact information, disclosure, and maintenance requirements. *See* Doc. 49, Def.'s App., 302.

Assuming without deciding that the Zoning Restrictions make the Ordinance more effective, the Court finds as a matter of law that they burden substantially more speech than is necessary to achieve the City's legitimate goals. *See Ward*, 491 U.S. at 798-99. The Zoning Maps submitted by Plaintiffs show that the three zones in which donation bins are currently allowed are peripheral areas, concentrated on manufacturing and industry, where they are unlikely to be seen by potential donors. Doc. 52, Pls.' App., 4-5. Daugherty's Declaration

admits that the Community Commercial zones, found in areas that "comprise the city center," were excluded because of their high traffic and visibility. Doc. 49, Def.'s App., 302 (discussing "gateway" intersections). Further, the Ordinance itself is evidence that if the City's basis for selecting the three permitted zones was adequate parking lot space for the placement of bins, *see* Doc. 54, Def.'s Resp., 20, it can address that concern with space-based, not zoning-based, requirements. *See* Arlington, Tex., Ordinance 18-044, §§ 3.03(D), (I), 3.06(D)-(G),(J)-(K) (Aug. 21, 2018).

While the City need not show that its chosen regulation is the most narrowly tailored way of achieving its goals, or permit donation boxes on every corner, a ban on donation bins in all other zoning districts—unless justified by evidence that the Ordinance's other regulations and/or less restrictive zoning limitations have proven ineffective to control bin-associated ills in those areas—is not narrowly tailored. *Cf. Recycle for Change*, 856 F.3d at 675 (accepting a city's determination that a 1,000 foot siting restriction between donation bins did not burden substantially more speech than necessary to control secondary effects). The Ordinance's current Zoning Restrictions fail intermediate scrutiny on that basis.

ii. Setback Requirement

Second, Plaintiffs assert that the Setback Requirement is unduly burdensome and prevents their charitable solicitation messages from being seen by the public. Doc. 56, Pls.' Resp., 31, 34 (citing *McCullen*, 573 U.S. at 488-

90); *see, e.g.*, Doc. 49, Def.'s App., 332. Arlington argues that the Setback Requirement is reasonable, "provid[ing] that donation boxes may not be placed within the row of parking adjacent to the street right-of-way unless there is a landscape setback" and "[i]f there is not a landscape setback, a donation box will not be allowed in the row of parking adjacent to the street right-of-way unless separated by 40 feet, a distance that is less than the length of a tractor trailer." Doc. 48, Def.'s Mot., 24. Arlington claims that "AOH affirmatively supported . . . including such a requirement in the Ordinance prior to its adoption." *Id.*

The Court finds that there is no genuine issue of material fact regarding the constitutionality of the Setback Requirement, which serves Arlington's public safety and aesthetic goals and does not burden substantially more speech than necessary. Even if a lesser setback requirement might also achieve Arlington's goals, this one passes muster. *See Ward*, 491 U.S. at 800 ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.").

Arlington's evidence shows that before the Ordinance some bins were surrounded by glass and other debris posing a hazard to pedestrians and vehicles, and contributed to an appearance of blight. *See, e.g.*, Doc. 49, Def.'s App., 32, 64-70, 79, 302. The Setback Requirement seeks to address these ills by locating bins and any

associated debris away from roadways and sidewalks, and reducing the visual prominence of the bins from the roadway. The evidence also shows that the City selected the current Setback Requirement after consulting with stakeholders and eliminating a screening requirement to address stakeholder visibility concerns. Doc. 49, Def.'s App., 114.

Plaintiffs' evidence that the current forty-foot Setback Requirement is overbroad or unduly burdens their speech is unpersuasive. Representatives of Plaintiffs and NFB's third-party partner testified that a setback requirement is a reasonable donation bin regulation, but take issue with the distance. Doc. 49, Def.'s App., 332, 389. Their unsupported opinions that the Setback Requirement makes it hard for potential donors to see their messages or find the bins do not create a genuine issue of material fact. The setback requirement makes Arlington's efforts to address its legitimate goals of public safety and visual attractiveness more effective, and the Court defers to the City's determination that the forty-foot limitation is appropriate. *See Ward*, 491 U.S. at 800; *cf. Recycle for Change*, 856 F.3d at 675 (accepting a city's determination that a 1,000 foot siting restriction between donation bins was a reasonable regulation).

McCullen, which Plaintiffs claim establishes that the setback is an unconstitutional "buffer zone" that burdens substantially more speech than necessary, is inapposite. *See McCullen*, 573 U.S. at 486-89. *McCullen* involved speakers who wanted to engage in direct, "personal, caring, consensual" conversations with potential visitors

to an abortion clinic. *Id.* at 489. Because these one-on-one conversations required a close, personal interaction, the Supreme Court held that the city's content-neutral ordinance excluding the would-be speakers from a 35-foot "buffer zone" around the clinic entrances violated those speaker's First Amendment rights. *Id.* at 472, 497. Here, at least some of the regulated donation bins are "silent solicitors" for Plaintiffs and other charities. *See Abbott*, 647 F.3d at 213. But none of them seek to engage in "personal, caring, consensual" conversations with potential donors.

The Court therefore finds that the Setback Restriction survives intermediate scrutiny and is facially constitutional.

D. *Prior Restraint*

Plaintiffs argue that the Ordinance's Permitting Requirements are a licensing scheme that is subject to strict scrutiny as a prior restraint on charitable speech. Doc. 51, Pls.' Br., 24-32.

A content-neutral law "subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must have "narrow, objective, and definite standards to guide the licensing authority" and prevent its exercise of excessive discretion.[12] *Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 280 (5th Cir. 2003) (quoting *Se. Promotions Ltd.*

12. A content-based license scheme must also contain adequate procedural protections. *Baker*, 506 F. Supp. 3d 413, 421-22. Because the Ordinance is content neutral, as explained above, the Court need not address the sufficiency of the Ordinance's procedural protections.

v. Conrad, 420 U.S. 546, 553, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975)); *see also Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958).

Plaintiffs argue that the Ordinance's Permit Requirements are a prior restraint and impermissibly infringe speech by "plac[ing] 'unbridled discretion in the hands of'" the permitting official, Doc. 51, Pls.' Br., 25 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988)), and conditioning approval on vague, undefined, or subjective terms including "landscape setback," "in good condition," "residential dwelling use district," "40-foot setback," "landscape buffer," "provider," "owner," and "applicant." *Id.* at 26-30; *see also* Doc. 56, Pls.' Resp., 23-28. Other terms such as "City Appeal Officer" are defined, but the provided definition is "woefully insufficient to provide applicants and appellants with notice of who [that] would actually be for purposes of lodging an appeal of a denial of a permit." Doc. 51, Pls.' Br., 30. Because the Ordinance is based on these vague, undefined, or subjective terms, its enforcement is inherently "arbitrary and discriminatory," and the Ordinance itself is facially unconstitutional, Plaintiffs claim. *Id.* at 31.

Arlington responds that the Ordinance is not a prior restraint because it establishes "reasonably specific, objective, and definite standards that do not leave the decision to grant or deny a permit application 'to the whim of the administrator.'" Doc. 64, Def.'s Reply, 23 (quoting *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 324, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002)). "[T]o obtain a donation

box permit, an applicant must satisfy eleven specific requirements set forth in the Ordinance and included on a standard checklist." *Id.* (citing Doc. 49, Def.'s App., 144-46). "If satisfied, a permit must be issued within sixty days," meaning city employees have no discretion to independently "determine the propriety of a permit." *Id.*

Regarding the allegedly vague and undefined terms, Arlington claims "provider," "owner," and "applicant" are "clearly understood by ordinary persons," while "landscape setback" gains clarity from the relevant provision of the Arlington Development Code, which is readily available on the City's website and "sets forth the landscape setback standards for properties on various types of roads, such as interstates, arterial collectors, and local roads." *Id.* (describing Arlington, Tex., UDC, art. 5, § 5.2.2.B, Table 5.2-1). The "in good condition" term similarly refers to violations of the Development Code. *Id.* at 23-24. Next, the "residential dwelling use district" limitation sets a 200-foot distance requirement between a "residential lot line" in "residential-zoned districts," a specific limitation that "[a]n ordinary person can easily understand," Arlington claims. *Id.* at 24 (citing Doc. 49, Def.'s App., 147). Finally, though the Ordinance does not explain "how to measure 40-feet from the public right-of-way" for the "40-foot setback" requirement, "[i]t is quite simple," Arlington maintains: "Using a measuring tape, an applicant must . . . ensure that the side of the donation box facing the right-of-way is at least 40 feet away." *Id.* at 24. Arlington does not respond to Plaintiffs' argument that the definition of "City Appeal Officer" is inadequate. *See id.* at 23-24.

The Court finds that the Ordinance is not an unconstitutional prior restraint. The summary-judgment evidence shows that the Ordinance provides reasonably "narrow, objective, and definite standards to guide the licensing authority." *See Chiu*, 339 F.3d at 281. Plaintiffs have not pointed to any evidence supporting their claims that the terms "provider," "owner," and "applicant" are confusing or subject to multiple interpretations leading to arbitrary application or granting unbridled discretion. *See Ragas*, 136 F.3d at 458. And the terms "landscape setback" and "residential dwelling use district" are reasonably specific in the context of the UDC, with which the Ordinance is compatible when not inconsistent. *See* Arlington, Tex., Ordinance 18-044 (Aug. 21, 2018) at 9.

Though the Court agrees with Plaintiffs that the "40-foot setback" requirement could be more clearly defined, *see id.* § 3.03(I) (not including any explanation that the 40-foot setback should be measured from the front of the box to the right-of-way facing that side of the box), the requirement as written is sufficiently definite and objective to restrain an official's exercise of discretion and to allow an applicant to challenge a denial on that basis. Finally, though Arlington has not responded to Plaintiffs' argument that "City Appeal Officer" is so vague as to prevent effective appeal of an adverse permitting decision, the Court finds that the term is not so vague that an applicant cannot effectively challenge a denial via a sufficiently-defined process.[13] *See id.* §§ 2.01, 3.09-

13. The Court additionally notes that collection of items by unattended donation bin is not a communicative activity that is inherently time-sensitive, like a parade or public protest, which

3.10; Doc. 49, Def.'s App., 205-08 (indicating that Plaintiff NFBTX received a hearing with the City Appeal Officer).

In sum, there is no evidence that this content-neutral Ordinance either censors speech or allows government officials unbridled discretion to limit speakers. The Ordinance is not an unconstitutional prior restraint.

IV.

CONCLUSION

In conclusion, for all the reasons explained above, the Court finds that: Plaintiffs have standing to bring a facial challenge to Arlington's donation bin ordinance; Plaintiffs' Partial Motion for Summary Judgment (50) should be and hereby is **GRANTED IN PART** and **DENIED IN PART**; and Defendant's Motion for Summary Judgment (47) should be and hereby is **GRANTED IN PART** and **DENIED IN PART**.

Specifically:

- Summary Judgment on Count I is **GRANTED IN PART** and **DENIED IN PART** for each party as follows. Ordinance 18-044 is not facially unconstitutional as a "Zoning Ban." Section 3.01(C)

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was a relevant factor in some of the prior restraint cases cited by Plaintiffs. *Cf. N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) ("[T]iming is of the essence in politics . . . . [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.").

of Ordinance 18-044 is facially unconstitutional because it burdens substantially more speech than is necessary to advance the City's legitimate interests. Arlington is hereby **ENJOINED** from enforcing Section 3.01(C) against Plaintiffs.

- Summary Judgment on the facial challenge asserted in Count II is **GRANTED** for Defendant.
- Summary Judgment on Count III is **GRANTED** for Defendant and **DENIED** for Plaintiffs.
- Summary Judgment on Count IV is **GRANTED** for Defendant and **DENIED** for Plaintiffs.

SO ORDERED.

SIGNED: September 9, 2022.

/s/ Jane J. Boyle

JANE J. BOYLE
UNITED STATES
DISTRICT JUDGE

APPENDIX C — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 16, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10034

NATIONAL FEDERATION OF THE BLIND OF TEXAS, INCORPORATED, A TEXAS NONPROFIT CORPORATION; ARMS OF HOPE, A TEXAS NONPROFIT CORPORATION,

Plaintiffs-Appellees/Cross-Appellants,

v.

CITY OF ARLINGTON, TEXAS, A MUNICIPAL CORPORATION,

Defendant-Appellant/Cross-Appellee.

August 16, 2024, Filed

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:21-CV-2028.

ON PETITION FOR REHEARING EN BANC

Before Barksdale, Southwick, and Graves, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the cowt be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX D — ARLINGTON ORDINANCES 16-020 (041216) AND 18-044 (082118)

ORDINANCE NO. 16-020

An ordinance creating the "Donation Boxes" Chapter of the Code of the City of Arlington, Texas, 1987; providing regulations for donation boxes and establishing requirements for permits allowing the placement of donation boxes on approved open spaces on private property; providing for a fine of up to $500 for each violation; providing this ordinance be cumulative; and providing for severability, governmental immunity, injunctions, publication, and an effective date

WHEREAS, the increase in the number of persons or entities desiring to collect clothing and household products for charitable purposes has led to the proliferation of donation boxes in various areas of the City; and

WHEREAS, the inability of landowners to accurately identify the owners of said donation boxes has resulted in decreased accountability on the part of donation box owners; and

WHEREAS, the failure to properly empty and clean donation boxes has resulted in an unsightly and littered appearance near said donation boxes; and

WHEREAS, City Council finds that regulating the placement and use of donation boxes is

necessary for the health, safety and welfare of the general public, the promotion of consistent land uses and development, and the protection of landowners and residents of the City of Arlington; NOW THEREFORE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ARLINGTON, TEXAS:

1.

That the **"Donation Boxes"** Chapter of the Code of the City of Arlington, Texas, 1987, is hereby established and shall read as follows:

ARTICLE I
GENERAL PROVISIONS

Section 1.01 <u>Title</u>

This Chapter of the Code of the City of Arlington is hereby designated and shall be known and referred to as the "Donation Boxes" Chapter of the City Code of Ordinances.

Section 102 <u>Purpose</u>

The purpose of this Chapter is to protect the public health, safety and welfare of Arlington residents by requiring the registration and permitting of donation boxes on private property within the City limits of the City

of Arlington. This Chapter further serves to protect the aesthetic well-being of the community and promote the tidy and ordered appearance of developed property. The provisions included herein are intended to provide efficient legal remedies for unpermitted or poorly maintained donation boxes that threaten the orderly development of the City. These provisions are cumulative of all City ordinances.

Section 1.03 Applicability

The requirements of this Chapter shall apply to all donation boxes regardless of whether said boxes were placed prior to the effective date of these regulations. No previously placed donation boxes shall be granted any legally non-conforming rights under this Chapter or the "Unified Development Code" Chapter of the Code of the City of Arlington, Texas, as amended.

ARTICLE II
DEFINITIONS

Section 2.01 Definitions

"Administrator" means the director of the department designated by the City Manager to enforce and administer this Chapter, and includes the Director's designees.

"Donation box" means any box, container, building, trailer or other receptacle that is intended for use as a collection point for donated clothing or other household materials.

"Person" includes an individual, sole proprietorship, corporation, association, nonprofit corporation, partnership, joint venture, a limited liability company, estate, trust, public or private organization, or any other legal entity.

ARTICLE III
REGISTRATION

Section 3.01 Donation Box—General Provisions

A. It shall be unlawful for any person to place or maintain, or allow to be placed or maintained, any donation box within the City of Arlington, without having first secured a permit and decal in compliance with the provisions of this Article.

B. Any donation box located within the jurisdiction of the City of Arlington that does not have a current, valid permit (or any permitted donation box that has received more than two (2) notices of violation from the City in the past 12 months) shall be subject to impoundment by the City. Any donation box impounded by the City shall be released to the owner upon payment of all applicable impoundment and storage fees.

C. Donation boxes shall only be permitted to be placed on real property located within the following zoning use districts in the Unified Development Code; Industrial Manufacturing (IM), Light Industrial (LI), and General Commercial (GC). Donation boxes shall not be permitted to be placed on real property located within any other zoning use districts.

Section 3.02 <u>Donation Box Permit and Decal Required</u>

It shall be unlawful for any person that owns, leases, is in control of or is entitled to possession of real property within the City of Arlington, to authorize or allow any donation box to be placed on or remain on such real property without a valid permit decal in compliance with the provisions of this Article.

Section 3.03 <u>Permit Requirements</u>

A permit and decal to allow a donation box to be placed and used on designated real property shall be issued by the Administrator after inspection and verification that the following conditions are satisfied:

1. The person receiving a permit to place or maintain a donation box is registered to operate in the State of Texas as a non-profit corporation *or* has proof of a written agreement to solicit on behalf of such a non-profit corporation.

2. The real property owner provides written authorization allowing the donation box on the property.

3. The permit holder agrees to be responsible for collecting the contents of the donation box in order to prevent overflow and littering.

4. No more than one (1) donation box may be permitted for placement on any one lot. In the case of a shopping center or office development that consists of multiple

platted lots, the Administrator shall treat the shopping center or office development as if it is only one contiguous lot.

5. No donation box shall exceed 50 square feet in size.

6. Each donation box shall clearly indicate in writing on the side of each box that all donations must fit into and be placed within the donation box.

7. The permit holder placing or maintaining the donation box shall display current contact information including street address and phone number on the donation box. Said information must be readable and clearly visible to the public.

8. Each donation box shall be screened from the nearest public street or right-of-way for which it is adjacent. If a donation box is located on a corner of a lot, then the box Anil be screened on a minimum of two sides. Minimum screening shall consist of a six foot (6') solid wood fence. Comparable materials may be substituted for screening upon prior approval of the Administrator. All screening shall be constructed to prevent the storage or placement of donations outside the donation box, with the screening fence itself being no more than two feet (2') from the screened donation box.

9. Each donation box shall be constructed from metal material.

10. Each donation box shall be painted one solid color. No high-intensity or fluorescent colors shall be used for the donation box or associated signage.

Section 3.04 **<u>Applications for Permits</u>**

A. Applicants for permits under this Article shall file a written, sworn application with the Administrator. The application shall include the written authorization of the property owner allowing the donation box on the property.

B. A separate permit and application shall be required for each donation box regardless of the ownership thereof. Permits issued under the provisions of this Article shall be valid only at the address stated on the permit.

C. An annual permit fee for each donation box shall be required. All permits shall expire on December 31st of each calendar year regardless of the date of issuance; provided, however, that the fee for each permit shall be prorated for each month or portion of a month for which the permit is issued.

D. Any person denied a permit shall have the right to appeal such action. In such case the procedure shall be the same as in revocation.

Section 3.05 **<u>Transfer of permit prohibited</u>**

No permit issued under the provisions of this Article shall be transferrable and the authority a permit confers

shall be conferred only on the permit holder named therein.

Section 3.06 **Maintenance and Upkeep**

A. The permit holder and the property owner shall be held jointly and severally liable and responsible for the maintenance, upkeep, and servicing of the donation box and clean up and removal of any donations left on the property outside of the donation box.

B. The City shall have the authority to abate any property in violation of this article that is deemed a public nuisance under the procedures contained in the "Nuisance" Chapter of the Code of the City of Arlington, Texas, 1987, as amended.

C. The visual and structural integrity of the donation box must be maintained continuously.

D. The placement of the donation box shall not impede traffic nor visually impair any motor vehicle operation within a parking lot, driveway or street.

E. The donation box shall not be located in a required building setback, buffer yard, access easement, drainage easement, floodplain, driveway, utility easement or fire lane.

F. At least one (1) stacking or parking space shall be required for use of persons accessing the donation box.

G. The donation box may not block or occupy any number of parking spaces required by the primary use structure.

H. The current permit decal for the specific donation box must be affixed and displayed at all times on the outside of the donation box.

I. The donation box shall only be used for the solicitation and collection of clothing and household materials. All donation materials must fit into and be placed inside the donation box. The collection or storage of any materials outside the container is strictly prohibited.

J. No donation box shall be permitted to be placed or remain placed within 200 feet from a residential dwelling use district. Said distance shall be measured from lot line to lot line.

K. The donation box shall he continuously maintained in compliance with all requirements imposed by Section 3.03, Permit Requirements, as amended.

Section 3.07 Revocation of permit

A. Grounds. Any permit issued hereunder may be revoked by the Administrator if the permit holder has received two (2) notices of violation for violations of this Chapter or any other provision of this Code of Ordinances within a 12 month time period or has knowingly made a false material statement in the application or otherwise becomes disqualified

for the issuance of a permit under the terms of this Article.

B. Notice. Notice of the revocation shall be given to the permit holder in writing, with the reasons for the revocation specified in the notice, served either by personal service or by certified United States mail to their last known address. The revocation shall become effective the day following personal service or if mailed, three (3) days from the date of mailing.

C. Appeal; hearing. The permit holder shall have ten (10) days from the date of such revocation in which to file notice with the Administrator of their appeal from the order revoking said permit. The Administrator shall provide for a hearing on the appeal not later than 15 days after the notice of the appeal is filed.

D. Stay. Any appeal of revocation pursuant to this section shall stay the revocation until said revocation is finalized.

E. Removal of Box; Impoundment. Upon finalization of any revocation, the permit holder shall remove said donation box no later than ten (10) days after said final decision. Upon expiration of this 10-day grace period, the donation box shall acquire noncompliant status and be subject to immediate impoundment without further notice.

F. One-Year Waiting Period. In the event the permit of any permit holder is revoked by the Administrator, no second or additional permit shall be issued to such

person within one year of the date such permit was revoked.

Section 3.08 <u>Fees</u>

All fees established by this Chapter shall be in *an* amount set by resolution of the City Council.

ARTICLE IV
ENFORCEMENT AND PENALTIES

Section 4.01 <u>Offense/Penalty</u>

A. A person who violates any provision of this Chapter by performing an act prohibited or by failing to perform an act required is guilty of a misdemeanor punishable by a fine not to exceed Five Hundred Dollars and No Cents ($500.00). Each day the violation continues shall be a separate offense.

B. A culpable mental state is not required for the commission of an offense under this Chapter.

C. Nothing in this Chapter shall limit the remedies available to the City in seeking to enforce the provisions of this Chapter.

D. All other legal remedies are reserved by the City if necessary to enforce the provisions of this Chapter. This shall be in addition to, and not in lieu of, the criminal penalties provided for in this Chapter.

2.

Any person, firm, corporation, agent or employee thereof who violates any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be fined an amount not to exceed Five Hundred Dollars and No Cents ($500.00) for each offense. Each day that a violation is permitted to exist shall constitute a separate offense.

3.

This ordinance shall be and is hereby declared to be cumulative of all other ordinances of the City of Arlington; and this ordinance shall not operate to repeal or affect any of such other ordinances except insofar as the provisions thereof might be inconsistent or in conflict with the provisions of this ordinance, in which event such conflicting provisions, if any, in such other ordinance or ordinances are hereby repealed.

4.

If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be unconstitutional, such holding shall not affect the validity of the remaining portions of this ordinance.

5.

All of the regulations provided in this ordinance are hereby declared to be governmental and for the health,

safety and welfare of the general public. Any member of the City Council or any City official or employee charged with the enforcement of this ordinance, acting for the City of Arlington in the discharge of his/her duties, shall not thereby render himself/herself personally liable; and he/she is hereby relieved from all personal liability for any damage that might accrue to persons or property as a result of any act required or permitted in the discharge of his/her said duties.

6.

Any violation of this ordinance can be enjoined by a suit filed in the name of the City of Arlington in a court of competent jurisdiction, and this remedy shall be in addition to any penal provision in this ordinance or in the Code of the City of Arlington.

7.

The caption and penalty clause of this ordinance shall be published in a newspaper of general circulation in the City of Arlington, Texas, in compliance with the provisions of Article VII, Section 15, of the City Charter. Further, this ordinance may be published in pamphlet form and shall be admissible in such form in any court, as provided by law.

8.

This ordinance shall become effective ten (10) days after first publication.

PRESENTED AND GIVEN FIRST READING on the 12th day of April, 2016, at a regular meeting of the City Council of the City of Arlington, Texas; and GIVEN SECOND READING, passed and approved on the 26th day of April, 2016, by a vote of 9 ayes and 0 nays at a regular meeting of the City Council of the City of Arlington, Texaas.

/s/ ______________________

W. JEFF WILLIAMS, Mayor

Appendix D

ORDINANCES GOVERNING DONATION BOXES IN THE CITY OF ARLINGTON TEXAS

Adopted by Ordinance No. 18-044
(August 21, 2018)

(Chapter Designator: DONATION BOXES)

ORDINANCE HISTORY

Number	Date of Adoption	Comments
16-020	04/26/16	Adopt new "Donation Boxes" Chapter of the Code of the City of Arlington, Texas, 1987; providing regulations for donation boxes and establishing requirements for permits allowing the placement of donation boxes on approved open spaces on private property.
18-044	08/21/18	Amend **Article II**, Definitions, in its entirety, and amend **Article III**, Registration, in its entirety, revising requirements for permits allowing the placement of donation boxes on approved open spaces on private property.

[Table of Contents Omitted]

Appendix D

ARTICLE I
GENERAL PROVISIONS

Section 1.01 <u>Title</u>

This Chapter of the Code of the City of Arlington is hereby designated and shall be known and referred to as the "Donation Boxes" Chapter of the City Code of Ordinances.

Section 1.02 <u>Purpose</u>

The purpose of this Chapter is to protect the public health, safety and welfare of Arlington residents by requiring the registration and permitting of donation boxes on private property within the City limits of the City of Arlington. This Chapter further serves to protect the aesthetic well-being of the community and promote the tidy and ordered appearance of developed property. The provisions included herein are intended to provide efficient legal remedies for unpermitted or poorly maintained donation boxes that threaten the orderly development of the City. These provisions are cumulative of all City ordinances.

Section 1.03 <u>Applicability</u>

The requirements of this Chapter shall apply to all donation boxes regardless of whether said boxes were placed prior to the effective date of these regulations. No previously placed donation boxes shall be granted any legally non-conforming rights under this Chapter

or the "Unified Development Code" Chapter of the Code of the City of Arlington, Texas, as amended. (Adopt Ord 16-020, 4/26/16)

ARTICLE II
DEFINITIONS

Section 2.01 Definitions

"Administrator" means the director of the department designated by the City Manager to enforce and administer this Chapter, including the Director's designees.

"City Appeal Officer" means the authorized person designated by the City Manager to hear appeals from denials or revocations of permits.

"Donation Box" means 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.

"Fluorescent" means a color that appears very bright, vivid, or glowing to the human eye.

"Front Side" means the side of a donation box that contains the opening that allows the depositing of donated items.

"GPS" means global positioning system.

"Person" includes an individual, sole proprietorship, corporation, association, nonprofit corporation, partnership, joint venture, a limited liability company, estate, trust, public or private organization, or any other legal entity.

(Amend Ord 18-044, 8/21/18)

ARTICLE III
REGISTRATION

Section 3.01 **Donation Box—General Provisions**

A. It shall be unlawful for any person to place or maintain, or allow to be placed or maintained, a donation box at any location within the City of Arlington, without a valid permit issued in accordance with this Article.

B. Any donation box located within the jurisdiction of the City of Arlington that does not have a current, valid permit shall be subject to impoundment by the City. Any donation box impounded by the City shall be released to the owner upon payment of all applicable impoundment and storage fees. If a donation box is impounded for longer than ten calendar days, it shall be considered abandoned property subject to disposal or sale at the City's sole discretion.

C. Donation boxes shall only be permitted to be placed on real property located within the following zoning use districts in the Unified Development Code: Industrial Manufacturing (IM), Light Industrial (LI),

and General Commercial (GC). Donation boxes may also be permitted on real property zoned Planned Development with the above-referenced underlying zoning use districts. Donation boxes shall not be permitted to be placed on real property located within any other zoning use districts.

Section 3.02 Donation Box Permit and Decal Required

It shall be unlawful for any person that owns, leases, is in control of, or is entitled to possession of real property within the City of Arlington, to authorize or allow any donation box to be placed on or remain on such real property without a valid permit decal in compliance with the provisions of this Article.

Section 3.03 Permit Requirements

A. Permit and decal required. A permit and corresponding decal to allow a donation box to be placed and used at a designated location shall be issued by the Administrator within sixty (60) days of receipt of a completed application after determining that all the requirements of this Section are satisfied.

B. Authorization for use. A written authorization allowing the donation box on the property shall be required from the real property owner, lessee, or property manager.

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.

D. Number of Boxes Allowed. No more than one (1) donation box may be permitted for placement on any one lot. In the case of a shopping center or office development that consists of multiple platted lots, the Administrator shall treat the shopping center or office development as if it is only one contiguous lot. In the case of a shopping center or office development, the Administrator can permit a single additional donation box; provided that neither box is within 50-feet of the other, unless both donation boxes are operated by the same person.

E. Maximum Size of the Box. No donation box shall exceed 120 cubic feet in size.

F. Construction Material for the Box. Each donation box shall be constructed from metal material to prevent

high winds from toppling and/or moving the donation box and to reduce the potential of arson or graffiti.

G. Color of the Box. Each donation box shall be painted one solid color. Trade dress color schemes or corporate logos will be allowed. No fluorescent colors shall be used for a donation box or its associated signage.

H. GPS Coordinates. No donation box shall be permitted without a valid set of GPS coordinates identifying the placement location of the donation box.

I. Placement on Site. No donation box shall be permitted within the row of parking adjacent to street right-of-way unless an existing landscape setback is present in good condition. If there is no existing landscape setback, a donation box shall not be placed less than 40 feet from the adjacent street right-of-way.

J. Notice to donators. Each donation box shall clearly indicate in writing on the front side of each box that all donations must fit into and be placed within the donation box. The size of lettering for the notice shall not be less than one-half inch in height.

K. Contact information. The permit holder placing or maintaining the donation box shall display current contact information including street address and phone number on the donation box. Said information must be readable and clearly visible to the public from the front side of the box. The size of lettering for the contact information shall not be less than one-half inch in height.

Section 3.04 Applications for Permits

A. Applicants for permits under this Article shall file a written, sworn application with the Administrator. The application shall include the written authorization of the property owner, lessee, or property manager allowing the donation box on the property. A site plan depicting the exact proposed location (with GPS coordinates indicated) of the donation box shall be submitted with each application.

B. A separate permit and application shall be required for each donation box regardless of the ownership thereof. Permits issued under the provisions of this Article shall be valid only at the address and GPS coordinates stated on the permit.

C. An annual permit fee for each donation box shall be required. All permits shall expire on the one-year anniversary of the date of issuance.

D. Any person denied a permit shall have the right to appeal such action in accordance with the provisions of Section 3.09.

Section 3.05 Transfer of permit prohibited

No permit issued under the provisions of this Article shall be transferrable. The authority a permit confers is conferred only on the permit holder named therein.

Appendix D

Section 3.06 <u>Maintenance and Upkeep</u>

A. The permit holder and the real property owner shall be held jointly and severally liable and responsible for the maintenance, upkeep, and servicing of the donation box and clean up and removal of any donations left on the property outside of the donation box.

B. The City shall have the authority to abate any property in violation of this article that is deemed a public nuisance under the procedures contained in the "Nuisance" Chapter of the Code of the City of Arlington, Texas, 1987, as amended. This provision does not exclude or limit the use of any other provision in this Chapter, the Arlington City Code, or the laws of the State of Texas.

C. The visual and structural integrity of the donation box must be maintained continuously.

D. The placement of the donation box shall not impede traffic nor visually impair any motor vehicle operation within a parking lot, driveway or street.

E. The donation box shall not be located in a required landscape or building setback, drainage easement, floodplain, driveway, utility easement or fire lane.

F. At least one (1) stacking or parking space must be provided for use of persons accessing the donation box.

G. The donation box must not be located in, or block public access to, any required off-street parking spaces, access easements, or stacking lanes serving a structure on the property, fire lane, or fire hydrant.

H. The current permit decal for the specific donation box must be affixed and displayed at all times on the outside of the donation box on the front side.

I. The donation box shall only be used for the solicitation and collection of clothing and household items. All donation materials must fit into and be placed inside the donation box. The collection or storage of any materials outside the container is strictly prohibited.

J. No donation box shall be permitted to be placed or remain placed within 200 feet from a residential dwelling use district. Said distance shall be measured from a donation box to a residential lot line.

K. The donation box shall be continuously maintained in compliance with all requirements imposed by Section 3.03, Permit Requirements, as amended.

Section 3.07 Revocation of permit

A. Grounds. Any permit issued hereunder may be revoked by the Administrator if the permit holder has (1) received a citation for a violation of this Chapter or any other provision of this Code of Ordinances within the preceding 12-month time period or (2) has knowingly made a false material statement in the

application or (3) has otherwise become disqualified for the issuance of a permit under the terms of this Article.

B. Notice. Notice of the revocation shall be given to the permit holder in writing, with the reasons for the revocation specified in the notice, served either by personal service or by certified United States mail to their last known address. The revocation shall become effective the day following personal service or if mailed, three (3) days from the date of mailing.

C. Appeal; hearing. The permit holder shall have ten (10) days from the date of such revocation in which to file notice with the Administrator of their appeal from the order revoking said permit. The Administrator shall provide for a hearing on the appeal in accordance with the provisions of Section 3.09 herein.

D. Removal of Box; Impoundment. Upon finalization of any revocation, the permit holder shall remove said donation box no later than ten (10) days after said final decision. Upon expiration of this 10-day grace period, the donation box shall acquire noncompliant status and be subject to immediate impoundment without further notice. Any donation box impounded by the City shall be released to the owner upon payment of all applicable impoundment and storage fees. If a donation box is impounded for longer than ten calendar days, it shall be considered abandoned property subject to disposal or sale at the City's sole discretion.

E. One-Year Waiting Period. In the event the permit of any permit holder is revoked by the Administrator, no second or additional permit shall be issued to such person within one year of the date such permit was revoked.

Section 3.08 Fees

All fees established by this Chapter shall be in an amount set by resolution of the City Council.

Section 3.09 Administrative Appeals of Denial or Revocation of Permit

A. Upon denial or revocation of a permit for a donation box, the Administrator, or his designee, shall notify the applicant or permit holder, in writing, of the reason for which the permit is subject to denial or revocation. The applicant or permit holder shall file a written request for a hearing with the Administrator within ten (10) days following service of such notice. If no written request for hearing is filed within ten (10) days, the denial or revocation is sustained.

B. The appeal shall be conducted within twenty (20) days of the date on which the notice of appeal was filed with the Administrator.

C. The hearings provided for in this Section shall be conducted by the Administrator or a designated hearing officer at a time and place designated by the Administrator or the hearing officer. Based upon the

recorded evidence of such hearing, the Administrator or the designated hearing officer shall sustain, modify or rescind any notice or order considered at the hearing. A written report of the hearing decision shall be furnished to the applicant or permit holder requesting the hearing.

D. After such hearing, an applicant that has had a permit denied or revoked by the Administrator may appeal to the City Appeal Officer designated by the City Manager to hear such appeals.

E. An appeal shall not stay the denial or suspension of the permit unless otherwise directed by the Administrator.

Section 3.10 **<u>Appeals of Administrator Decision</u>**

A. All appeals to the City Appeal Officer must be made in writing and received no less than ten (10) days after any final decision made by the Administrator or the designated hearing officer in accordance with Section 3.09 above.

B. The City Appeal Officer shall schedule the appeal hearing for no less than twenty (20) days from receipt of the appellant's appeal.

C. If the City Appeal Officer finds by preponderance of the evidence that the denial or revocation of the donation box permit was necessary to protect the health, safety, or welfare of the general public,

the City Appeal Officer shall affirm the denial or revocation of appellant's donation box application or permit.

D. The City Appeal Officer may consider any or all of the following factors when reaching a decision on the merits of the appeal:

1. The number of violations, convictions, or liability findings;

2. The number of previous revocations;

3. The number of repeat violations at the same location;

4. The degree to which previous violations endangered the public health, safety or welfare; or

5. Any pending action or investigation by another agency.

E. After the hearing, the City Appeal Officer shall issue a written order. The order shall be provided to the appellant by personal service or by certified mail, return receipt requested.

F. The City Appeal Officer may affirm or reverse the denial or revocation of the donation box permit. If affirmed, the order issued must state that the appellant is not eligible to receive a new donation

box permit sooner than one year after the date of the order. If reversed, the donation box permit shall be reinstated immediately (in the case of a revocation) or within three (3) business days (in the case of a denial).

G. The determination of the City Appeal Officer shall be final on the date the order is signed.

H. An appeal to the City Appeal Officer does not stay the effect of a denial or revocation or the use of any enforcement measure unless specifically ordered by the Administrator or the City Appeal Officer.

(Amend Ord 18-044, 8/21/18)

ARTICLE IV
ENFORCEMENT AND PENALTIES

Section 4.01 Offense/Penalty

A. A person who violates any provision of this Chapter by performing an act prohibited or by failing to perform an act required is guilty of a misdemeanor punishable by a fine not to exceed Five Hundred Dollars and No Cents ($500.00). Each day the violation continues shall be a separate offense.

B. A culpable mental state is not required for the commission of an offense under this Chapter.

C. Nothing in this Chapter shall limit the remedies available to the City in seeking to enforce the provisions of this Chapter.

D. All other legal remedies are reserved by the City if necessary to enforce the provisions of this Chapter. This shall be in addition to, and not in lieu of, the criminal penalties provided for in this Chapter. (Adopt Ord 16-020, 4/26/16)