



Jun 03, 2015

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Charity Bins are a form of Communication, according to the Sixth Circuit

On April 6, 2015, the Sixth Circuit Court of Appeals issued a decision in *Planet Aid v. City of St. Johns, MI*, addressing the issue of whether a city ordinance banning outdoor, unattended charitable donation bins is constitutional. In a case of first impression for the Sixth Circuit, the Court held that (1) charitable donation bins were charitable solicitations entitled to strong First Amendment protection; (2) that an ordinance banning charitable donation bins was content-based, so that strict scrutiny applied to a First Amendment challenge; and (3) that the ordinance violated the First Amendment right to free speech.

Background

Planet Aid is a nonprofit charitable organization that solicits donations of clothing and shoes through its unattended, outdoor donation bins. Planet Aid placed some of its donation bins on the property of private businesses in the City of St. Johns, Michigan. It chose locations that were easily visible and accessible by individuals looking to deposit donations. Planet Aid generally visited each of its donation bins on a weekly basis in order to collect the donated goods and avoid bin overflow and accumulation.

On January 14, 2013, the City sent Planet Aid a letter claiming that the “clothing donation containers have been found to create a nuisance as people leave boxes and other refuse around the containers,” and requesting Planet Aid to remove the bins. At that time, there was no city ordinance regulating charitable donation bins. After Planet Aid refused to remove the bins, the City removed them and transported them to a city facility where they were later collected by Planet Aid.

Approximately one year later, the St. Johns City Council voted to adopt ordinance #618, which effectively banned unattended, outdoor donation bins.

On February 14, 2014, Planet Aid filed a five-count complaint alleging, among other things, that ordinance #618 violated Planet Aid's First Amendment rights by infringing on Planet Aid's protected speech of charitable solicitation and giving. Planet Aid also filed a motion for a temporary restraining order and preliminary injunction.

Legal Analysis

The Sixth Circuit Court of Appeals turned to the merits of Planet Aid's First Amendment claim to determine whether to issue an injunction.

First, the Court analyzed the level of constitutional protection that should be afforded to unattended donation bins. Although the United States Supreme Court had never addressed the status of such donation bins, the Court turned to the Fifth Circuit's analysis on this issue. The Fifth Circuit in *National Federation of the Blind of Texas, Inc. v. Abbott* previously held that public receptacles are not mere collection points for unwanted items, but rather, are silent solicitors and advocates for particular charitable causes. The Sixth Circuit agreed. The Court reasoned that a charitable donation bin can – and does – “speak.” In many respects, the Court found that donation bins mirror the passive speaker on the side of the road, holding a sign drawing attention to his cause. For those reasons, the Court held that speech regarding charitable giving and solicitation is entitled to *strong constitutional protection*. The fact that such speech may take the form of a donation bin does not reduce the level of its protection.

However, the fact that government regulation may incidentally impact some protected speech does not automatically trigger strict scrutiny. Government regulations of protected speech are subject to strict scrutiny only if they target protected speech, *i.e.*, if they are content-based. With this in mind, the Court turned to its next analysis – whether ordinance #618 was content-based or content-neutral. The Court noted that the First Amendment's hostility to content-based regulations extends not only to restriction on particular viewpoints, *but also to prohibition of public discussion of an entire topic*. In other words, a law may be content-based even if it is viewpoint-neutral. Ultimately, the Court held that ordinance

#618 was clearly content-based. The Court reasoned that the ordinance did not ban or regulate *all* unattended, outdoor receptacles – it only banned those unattended, outdoor receptacles with an expressive topic on charitable solicitation and giving. Thus, the ordinance was not “unrelated to expression.” Since the ordinance was content-based, the Court applied the highest level of scrutiny when analyzing the constitutionality of the ordinance – the ordinance could stand only if it satisfied strict scrutiny.

In applying the strict scrutiny analysis, a city bears the burden of establishing that an ordinance is “narrowly tailored to promote a compelling Government interest.” Additionally, if a less restrictive alternative would serve the Government’s purpose, a city must use that alternative. In the instant case, the Court held that the City did not meet this burden. In its analysis, the Court stated that “[t]he ordinance preemptively and prophylactically prevents all charities from operating outdoor, unattended donation bins within the City in the interest of aesthetics and preventing blight.” The Court continued: “This implies, without any evidence, that charities would be negligent in failing to conduct timely pickups of donated goods, in maintaining the appearance of the bins, etc. Further, it assumes that lesser, content-neutral restriction such as requiring weekly or bi-weekly pickups or inspections of all outdoor receptacles would be ineffective.” Essentially, the Court reasoned that there are multiple, less restrictive alternatives that would serve the City’s interests. Accordingly, the ordinance was not narrowly tailored to promote a compelling interest, and did not withstand strict scrutiny.

Although this was not a final determination of the case, the Court’s ruling on the preliminary injunction enjoins the enforcement of the ordinance.

The Court did, however, confirm that local governments may regulate the physical characteristics of outdoor structures, *provided the regulations are content-neutral*. While ordinance #618 did not merely regulate bins’ height, size, cleanliness, or where they may be located – it banned them altogether – other courts have upheld ordinances that regulated the height, width, depth, and location of newsracks on public property. Local communities should

be aware of potential First Amendment conflicts. While seemingly innocent, ordinances that may be aimed at preventing blight, preserving aesthetics, and avoiding the creation of nuisances, can ultimately run afoul certain constitutional rights.

The full opinion can be [read here](#).

If you have any further questions regarding this case or its application, please contact [Yazan S. Ashrawi](#), [Philip K. Hartmann](#), or any member of the Frost Brown Todd [Government Services practice group](#).

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