Case No. 19-320

IN THE

SUPREME COURT OF THE UNITED STATES

Mack Strong,

Petitioner,

v.

State of West Columbia,

Respondent.

On Writ of Certiorari
To the Supreme Court of West Columbia

BRIEF FOR PETITIONER

Louisa Karam
One Camino Santa Maria
San Antonio, Texas 78228

Counsel for Petitioner

March 6, 2020

QUESTIONS PRESENTED

I. Whether the Starwood City Code prohibiting people from solicitation, a protected form of speech, violates Mr. Strong's First Amendment right.

II. Whether Mr. Strong, a homeless individual, has a reasonable expectation of privacy in his belongings kept inside of his temporary home.

PARTIES TO THE PROCEEDING

Petitioner, Mack Strong, was the defendant before the District Court of Jackson County, the appellate before the West Columbia Court of Appeals, and the petitioner before the Supreme Court of West Columbia.

Respondent, State of West Columbia, was the plaintiff before the District Court of Jackson County, the appellee before the West Columbia Court of Appeals, and the respondent before the Supreme Court of West Columbia.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

OPINIONS BELOW

The Judgment of the District Court of Jackson County, West Columbia, is unpublished. R. at 2. The Judgment of the West Columbia Court of Appeals is unpublished. R. at 65. The judgment of the Supreme Court of West Columbia is unpublished. R. at 70.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on December 19, 2018. R. at 67. Petitioner timely filed a Petition for Writ of Certiorari, which this Court granted on August 17, 2019. R. at 74. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STANDARD OF REVIEW

This Court reviews a district court's findings of fact for clear error and its legal conclusions *de novo*.

PROVISIONS INVOLVED

"Congress shall make no law . . . abridging the freedom of speech . . . ."

U.S. Const. amend. I.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

U.S. Const. amend. IV.

STATEMENT OF THE CASE

Mr. Mack Strong lost his job due to mental health problems resulting from his time serving the United States in Afghanistan. R. at 10. Due to his lack of income, his landlord evicted him from his apartment. R. at 4. Mr. Strong now lives in a secluded section of Confluence Park and attains his basic needs for survival by begging in Downtown Starwood. *Id.*

One evening, Officer Jones watched an individual he presumed to be homeless, later identified as Mr. Strong, approach a pedestrian and speak with them. R. at 10. Officer Jones suspected Mr. Strong was violating the State's ordinance against aggressive panhandling. R. at 37. To confirm his suspicion, Officer Jones moved closer and hid behind a tree to hear what Mr. Strong said to the pedestrian. *Id.* After hearing the words spoken by Mr. Strong, Officer Jones detained him for violating the State ordinance. R. at 4.

While this occurred, in response to a lead, Officer Brown entered Confluence Park with the intent to find where Mr. Strong lived. R. at 4, 19. Officer Brown came across a tent in a heavily wooded, secluded area of the park. R. at 40, 43. Officer Brown testified that she presumed Mr. Strong used the tent as his home. R. at 40.

Without probable cause, a warrant, or consent, Officer Brown entered Mr. Strong's home. R. at 40. After entering, she set his bedroll aside and opened a plastic bin finding his purple heart medal, his driver's license, and books inside. R. at 10. Next, after untying and unrolling his bedroll, Officer Brown found and illegally obtained the plastic bag containing contraband. R. at 40. Upon finding this bag, Officer Brown radioed Officer Jones. *Id.* Officer Jones and Mr. Strong arrived at the tent. *Id.* Mr. Strong immediately established his subjective expectation of privacy by claiming ownership to his belongings when he said "Hey that's my property! You can't just go through it without my permission!" R. at 5, 60.

The Jackson County Grand Jury charged Mr. Strong on two counts. R. at 3. Mr. Strong filed a motion to dismiss count 1 on the grounds that Starwood's ordinance violates his First Amendment rights. R. at 10. In relation to count 2, Mr. Strong filed a motion to suppress the evidence obtained during the illegal search of his temporary home. R. at 4. The district court denied both motions and the case proceeded to trial. R. at 29, 30. Mr. Strong was convicted on both charges. R. at 55. Mr. Strong appealed. R. at 56. The West Columbia Court of Appeals affirmed the judgment of the lower court. R. at 57. Mr. Strong petitioned for review. R. at 66. The Supreme Court of West Columbia affirmed the judgment of the Court of Appeals. R. at 66. The Supreme Court grants the petition for writ of certiorari. R. at 74.

SUMMARY OF THE ARGUMENTS

In this case, a homeless veteran was arrested while exercising his fundamental right to free speech. Police officers then ransacked his home and possessions in violation of his right to privacy.

The Starwood ordinance is unconstitutional because it is content-based on its face: the ordinance targets the content of an individual's speech by regulating solicitation, a protected area of speech. This alone establishes the ordinance as unconstitutional. Since the regulation targets the subject matter of speech, the ordinance fails under the strict scrutiny test. The ordinance is not narrowly tailored to serve a compelling government interest because the ordinance goes beyond time, place, and manner restrictions. Even if the ordinance was content-neutral, it does not satisfy the intermediate scrutiny test.

Officer Brown violated Mr. Strong's Fourth Amendment protections by her unlawful search and seizure because Mr. Strong had an objective and subjective expectation of privacy in his temporary home and his effects inside the home. Officer Brown entered the park searching for Mr. Strong's home. Society has long recognized that the home deserves the utmost protection under

the Fourth Amendment. Even if not recognized as a home, Mr. Strong's tent and effects are principally protected because the Fourth Amendment protects people and their effects, not places. Mr. Strong established his subjective expectation of privacy upon his immediate arrival to his home after Officer Brown entered his tent and searched through his belongings

The Starwood ordinance prohibits specific speech, proving content-based on its face and thus unconstitutional. Mr. Strong established his subjective expectation of privacy in his effects that society readily accepts. Thus, the officer violated his constitutional right to privacy. Mr. Strong deserves the freedoms and protections he fought to protect.

ARGUMENTS

I. The Starwood ordinance violates Mr. Strong's First Amendment right to free speech.

The First Amendment prohibits Congress from making laws to abridge one's freedom of speech. U.S. Const. amend. I. While the language refers specifically to Congress, this Amendment applies to all States through the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. The protection of the First Amendment is not unlimited. U.S. Const. amend. I; *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015). For example, the government may place restrictions on the time, place, and manner of speech, but generally cannot restrict expression due to its message, ideas, subject matter, or content. *Reed*, 135 S. Ct. at 2226.

The first step in First Amendment matters is to determine whether the speech in question is protected. U.S. Const. amend. I; *Reed*, 135 S. Ct. at 2227. The Amendment does not protect the following categories of speech: speech designed to incite illegal activities, fighting words, obscenity, child pornography, and defamation. U.S. Const. amend. I. Generally, the First Amendment protects all other categories of speech. *Hill* v. Colorado, 530 U.S. 703, 715 (2000)

(listing areas of protected speech). The First Amendment protects solicitation of money and panhandling, both forms of free speech. U.S. Const. amend. I; *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 232 (D. Mass. 2015) (stating several forms of solicitation for money is protected speech). The level of scrutiny a court will apply for alleged violations of free speech also depends on where the speech takes place. *Thayer*, 144 F. Supp. 3d at 232. Traditionally, in a public forum, the government may impose content-neutral time, place, and manner restrictions so long as the regulation imposed meets the scrutiny requirements. *Id.* Public sidewalks and streets are "quintessential" public forums for free speech. *Hill*, 530 U.S. at 715.

The Starwood ordinance regulates "[a]ggressive panhandling" in the "Downtown Square vicinity." Starwood City Code § 22-13 (2016). Since this ordinance applies in a traditionally public forum, the First Amendment applies. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Therefore, the First Amendment recognizes panhandling as protected speech. *Id.* Next, to determine whether a statute violates the First Amendment, the court must decide whether the regulation in question is content-based or content-neutral. *Reed*, 135 S. Ct. at 2228. The scrutiny afforded to a speech-related restriction in a public forum depends on whether the restriction can be classified as content-based or content-neutral. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (holding a regulation that prohibits sleeping in a public park has reasonable time, place, and manner restrictions).

A. The Starwood ordinance is unconstitutional because it is a content-based regulation that targets the content of a protected category of speech.

A content-based regulation targets the specific subject matter of speech even without discriminating against viewpoints within that subject matter. *Reed*, 135 S. Ct. at 2230. Courts apply strict scrutiny to a law that is content-based on its face despite the government's intent, content-

neutral reasoning, or lack of animus toward the ideas contained in the speech. *Id.* at 2228. Courts have recognized laws, though content-neutral on their face, to be content-based. *Id.* These include laws unable to be justified without referencing the content of the regulated speech. *Id.* at 2227.

Courts find content-based laws presumptively unconstitutional. *Id.* at 2226. These laws can only overcome that presumption if the government proves the regulation is narrowly tailored to serve a compelling state interest. *Id.* This is the strict scrutiny test. *Id.* A content-based regulation must survive the strict scrutiny test. *Id.* at 2231. Whether the regulation is content-based on its face must first be established before looking at the governmental purpose. *Id.* at 2228. If both factors are not satisfied, the regulation is content-neutral. *Ward*, 491 U.S. at 791.

In *Thayer v. City of Worchester*, the City passed a regulation prohibiting any person from begging, panhandling, or soliciting in an aggressive manner. *Thayer*, 144 F. Supp. 3d at 228. The court found part of the ordinance, specifically Ordinance 9, to be content-based because it targeted anyone seeking to engage in a specific type of speech. *Id.*

Additionally, the Court in *Carey v. Brown* ruled regulations prove to be content-based not only when they regulate a specific viewpoint, but also when the government regulates a general subject matter. 447 U.S. 455, 462 (1980). In this case, protestors picketed outside the mayor's home because of his failure to integrate school busses. *Id.* at 457. The ordinance prohibited picketing about labor disputes outside someone's home. The ordinance allows this same act on sidewalks or in front of office buildings. Therefore, the Court ruled this as a content-based restriction, not satisfying strict scrutiny, and thus unconstitutional. *Id.* at 462. The Court noted a necessary distinction in the "content and context" of the picketers. *Id.* at 484. Because the picketing occurred specifically outside the mayor's home, their picketing was prohibited. *Id.*

To decide if the Starwood ordinance proves content-based on its face, we must examine the language used in the regulation. *Reed*, 135 S. Ct. at 2230. The ordinance defines "aggressive panhandling" as intentionally approaching a person "within eight feet . . . to request or solicit an immediate donation of money . . . regardless of the solicitor's purpose or intended use of the money." Starwood City Code § 22-13(a)(1) (2016). Although the ordinance appears to restrict panhandling considered to be aggressive, the ordinance's definition of the term aggressive places a restriction on the content of a person's speech. *Id.* This language restricts what a person can solicit and disregards the solicitor's intention of their solicitation. *Id.*

In *Thayer*, the court also disregarded the intent of the solicitor by banning all aggressive panhandling, and the court ruled the ordinance unconstitutional. *Thayer*, 144 F. Supp. 3d at 228. In *Carey*, the intent of picketing outside a government office was to promote judicial change, which the court ruled constitutional. *Carey*, 447 U.S. at 484. Unlike the ordinance in *Carey*, the Starwood ordinance disregards the intention of the actor to act aggressively. Starwood City Code § 22-13 (2016); *Carey*, 447 U.S. at 484. Given the Court's reasoning in *Carey*, the Starwood ordinance must look at the intent of the actor. *Id.* Thus, the Starwood ordinance proves content-based on its face due to its restriction on the content of speech. *Id.* Now, we will look to the actions of Mr. Strong in relation to the ordinance.

Mr. Strong violated the State ordinance against aggressive panhandling. Starwood City Code § 22-13 (2016); R. at 67. The ordinance restricts the time, place, and manner one can solicit. Starwood City Code § 22-13(a)(1). Mr. Strong violated each of these categories by approaching a citizen without their consent during the day in the Downtown Square vicinity. *Id.* § 22-13(b)(1). These factors are based on Mr. Strong's conduct, rather than the words he used to panhandle.

Notably, the ordinance includes a restriction on what a person can solicit. *Id.* § 22-13(a)(1). The ordinance states a person cannot "request or solicit an immediate donation of money." *Id.* Mr. Strong said, "You got any change man? Come on, I'm hungry. Come on, just gimme something, I wanna eat." R. at 33. Officer Jones overheard Mr. Strong ask the citizen for a donation of money, and immediately after, approached Mr. Strong. *Id.* In the police report, the officer specified the exchange of money violated the State's ordinance. R. at 34. Principally, when an officer must listen to what the speaker says to decide if the person's conduct violates a statute, the regulation is content-based, not content-neutral. *McCullen v. Coakley*, 573 U.S. 464, 481 (2014) (holding a law is content-based when it directly references the content of regulated speech). The Starwood ordinance prohibits "aggressive panhandling" and solicitation. Starwood City Code § 22-13 (2016). However, because Officers Jones walked closer to hear Mr. Strong, the language Mr. Strong used, in addition to his conduct, was necessary to establish whether Mr. Strong violated the ordinance. R. at 36. This relates directly to the content of what Mr. Strong said. *Id.* Thus, the ordinance restricts not merely a person's conduct, but more significantly their words, and proves content-based on its face. Starwood City Code § 22-13 (2016).

Content-based regulations rarely survive the strict scrutiny test. *Reed*, 135 S. Ct. at 2231. A law must be proven to be narrowly tailored to serve a compelling government interest to survive strict scrutiny. *Id.* at 2226. Narrowly tailored means the government can place only time, place, and manner restrictions on such speech. *Hill*, 530 U.S. at 704. Frequently, the government states their compelling interest is to protect the safety and welfare of their citizens. *Id.* at 714. The Court in *Reed* held the Gilbert Sign Code as content-based on its face and thus subjected the code to strict scrutiny. *Reed*, 135 S. Ct. at 2227. In this case, a church violated an ordinance prohibiting signs of specific content from being placed around the city to avoid the negative aesthetic the signs

created in the city. *Id.* at 2231. The Court ruled this was not a significant government interest, and any innocent motives on part of the town did not eliminate the danger of censorship. *Id.* at 2227. The sign code singled out specific subjects, granting them different treatment. *Id.* The Court held the code to be content-based because it was not narrowly tailored to satisfy a compelling government interest, even though the code did not target viewpoints within the subject matter of the signs. *Id.*

The restrictions of speech cannot go beyond the needs of security justified. *Ward*, 491 U.S. at 799. The government of Starwood claims the purpose of their ordinance is to protect the "privacy rights of unwilling listeners . . . against crime and undue annoyance." Starwood City Code § 22-13; R. at 12. In *Thayer*, criminal laws already existed to protect the government's interest of societal safety. *Thayer*, 144 F. Supp. 3d at 224 (including criminal laws against trespass, assault, battery, and disorderly conduct). Therefore, Starwood should enact legislation against criminal activities to satisfy their compelling interest. Merely creating a regulation against aggressive panhandling does not satisfy the government's compelling interest since alternative areas for criminal activity are sufficiently left open. R. at 12. The language of the Starwood ordinance does not satisfy this interest of safety. Starwood City Code § 22-13 (2016). Nor has the State proven that prohibiting verbal solicitation will increase the safety of the public. R. at 12.

The city ordinance in *Reed* proves similar to Starwood's ordinance. Starwood City Code § 22-13 (2016); *Reed*, 135 S. Ct. at 2231. In both cases, the regulation places restrictions on specific messages displayed by written words or vocal speech. *Reed*, 135 S. Ct. at 2231. In *Reed*, the ordinance restricts signs stating the time and location of church services. *Id.* The Starwood ordinance restricts the specific solicitation of money. Starwood City Code § 22-13(a)(1) (2016); R. at 12. The ordinance is not narrowly tailored because it regulates the content of speech,

infringing on an individual's First Amendment rights. *Carey*, 447 U.S. at 462. Thus, this ordinance is not narrowly tailored to satisfy a compelling governmental interest.

This ordinance proves content-based on its face since it targets the content of speech, subjecting it to strict scrutiny. Starwood City Code § 22-13 (2016); R. at 62. Thus, this ordinance fails strict scrutiny.

B. The Starwood ordinance is not content-neutral and would still fail under intermediate scrutiny.

Although the ordinance is content-based, if the Court disagrees, then the ordinance must be content-neutral. *Ward*, 491 U.S. at 791. A rule of law is content-neutral if it is justified without reference to the content of the speech. *Id.* Content neutrality depends on whether the government adopted a regulation of speech because it disagreed with the message the speech conveyed. *Hill*, 530 U.S. at 719; *Ward*, 491 U.S. at 791. If the speech passes intermediate scrutiny, the regulation is constitutional. *Ward*, 491 U.S. at 791. The "controlling consideration" is the "government's purpose." *Id.*

Content-neutral claims trigger intermediate scrutiny. *Reed*, 135 S. Ct. at 2239. Content-neutral time, place, and manner restrictions are analyzed under intermediate scrutiny and must be narrowly tailored to serve a significant government interest. *Id.* Narrowly tailored means the regulation promotes a substantial government interest that would be achieved less effectively without the regulation. *Ward*, 491 U.S. at 766. The regulation cannot burden substantially more speech than necessary to promote the government's legitimate interest. *Id.* at 799. Lastly, the regulation must leave open ample alternative channels for communication. *Hill*, 530 U.S. at 726; *Ward*, 491 U.S.

at 799. To pass intermediate scrutiny, a regulation must pass all three of these criteria. *Ward*, 491 U.S. at 791.

In *Hill*, the City adopted a statute to restrict approaching an individual within eight feet and within 100 feet of a healthcare facility. 530 U.S. at 719. This statute passes the content-neutral test for three reasons. *Id.* First, the statute did not regulate speech but regulated the place where some speech may occur. *Id.* Second, the government had a significant interest in preventing potential physical and emotional harm suffered when an unwelcome individual delivers a message, not considering the content of such speech. *Id.* And third, the statute provided police with clear guidelines on how to evenhandedly apply the law in matters unrelated to the content of speech. *Id.* The court ruled this statute content-neutral and constitutional. *Id.*

The Starwood ordinance is distinguished from the Colorado ordinance in *Hill* because it disregards the actor's intent. Starwood City Code § 22-13 (2016); *Hill*, 530 U.S. at 719. Unlike the Starwood ordinance, the Colorado ordinance merely places time, place, and manner restrictions on speech. *Id.* While the Colorado ordinance in *Hill* restricts any speech intended to persuade, the Starwood ordinance restricts speech specific to an immediate donation, regardless of intent. Starwood City Code § 22-13 (2016); *see Hill*, 530 U.S. at 719 (holding the ordinance against intended persuasive speech outside of healthcare facilities constitutional). Intent to persuade is a mandatory factor in the Colorado ordinance, which the Starwood ordinance lacks. *Id.* The City of Starwood places no value on the actor's intention to act aggressively. Starwood City Code § 22-13 (2016). This restricts what a person says rather than intentional aggressive behavior, which is more narrowly tailored. *Id.* Thus, the Starwood ordinance would not be narrowly tailored.

Even in a public forum, the government may place reasonable restrictions on time, place, or manner of speech. *Ward*, 491 U.S. at 791. Reasonable restrictions must be content-neutral,

narrowly tailored to further a significant government interest, and leave open ample alternative channels for communication of the information. *Hill*, 530 U.S. at 749 (Scalia, J., dissenting); *Ward*, 491 U.S. at 791. The Starwood ordinance places restrictions on the manner one can solicit by regulating the distance between a solicitor and a citizen and restrictions on the place by specifying the Downtown Square vicinity. Starwood City Code § 22-13 (2016). The ordinance places a restriction on the time of day, by prohibiting solicitation at all times of day. *Id.* The State would argue these restrictions of time, place, and manner are acceptable under the First Amendment and properly serve the government's interest in public safety. *Ward*, 491 U.S. at 791. However, the language of the ordinance does not support this position. Starwood City Code § 22-13 (2016).

Proving a significant government interest is the next step of the intermediate scrutiny test. *Reed*, 135 S. Ct. at 2228. It is well settled that governments have a significant interest in public safety and protecting citizens from harassment or inconvenience. *Hill*, 530 U.S. at 716. Additionally, in *Gresham v. Peterson*, the government was interested in protecting citizens from the threatening environment created from panhandling. 225 F.3d 899, 901 (7th Cir. 2000). Rather than banning panhandling completely, the City decided to restrict the time, place, and manner one can solicit. *Id.* at 903. The regulation restricted panhandling after dark and situations where escape would be difficult, like standing at an atm or in line for an event. *Id.* at 901.

The government of Starwood claims to be interested in protecting the safety of its citizens through the enactment of the Starwood ordinance on aggressive panhandling. Starwood City Code § 22-13 (2016). The State claims this restriction on aggressive panhandling is necessary to protect safety in the downtown area. R. at 27. The Starwood ordinance prohibits panhandling at all times of the day and night, unlike the ordinance in *Gresham.* Starwood City Code § 22-13 (2016); *Gresham*, 225 F.3d at 901. There is no information about the frequency of aggressive panhandling

in Downtown Starwood, and there is no information proving this is a safety hazard for their citizens. R. at 28. More information about this is needed to prove the government's interest.

The State has not carried their burden to prove by a preponderance of the evidence that this prohibition satisfies the State's interest of public safety and economic prosperity. *Hill*, 530 U.S. at 770 (Kennedy, J., dissenting); R. at 27-28. The State provides no evidence that prohibiting aggressive panhandling in this small, limited area of the city will increase public safety or have any effect on the State's economy. *See* R. at 27-28 (providing the statement of legislative need for the Starwood ordinance). According to the Statement of Legislative Need, the City has a large unemployment rate due to the lack of jobs. R. at 27-28. If the State's interest is to promote safety and increase their economy, regulating panhandling would not solve this issue. *Id.* Rather, the State should create jobs to promote their economy and remove individuals from the streets.

The government's interest is not satisfied because there is no requirement for intent to cause a crime or undue annoyance by asking for a donation of money. R. at 14. The satisfaction of a compelling government interest would fail because the ordinance fails to mention intent of the panhandler to cause an annoyance. *Id.* No evidence presented proves that Mr. Strong intended to commit a crime or threaten the safety of any citizen of Starwood. R. at 10-11. Therefore, the interest alleged, keeping citizens safe, does not align with prohibiting the solicitation of money.

Reasonable restrictions must leave open ample alternative channels for communication. *Hill*, 530 U.S. at 749 (Scalia, J., dissenting); *Ward*, 491 U.S. at 791. In *Hill*, the statute placed no limit on number, size, text or images on placards, or on number of speakers or noise level, and did not prohibit a leafletter from standing near path of oncoming pedestrian to offer material. *Hill*, 530 U.S. at 726-27. This left open ample alternative channels for communication. *Id.*

Mr. Strong stated he survives on donations, a situation similar to other homeless individuals. R. at 10. In Starwood, a small town, the downtown is the most populated area. R. at 27. Mr. Strong likely has no other alternative places to request donations. Restricting the primary means of income for the homeless, as this ordinance suggests, could prevent their survival. Starwood City Code § 22-13(c) (2016). Additionally, the ordinance prohibits panhandling at all times of the day and night. *Id.* This does not leave open ample alternative times to ask for donations. This regulation restricts ample alternative channels for communication.

The Starwood ordinance disregards the element of intent. Starwood City Code § 22-13 (2016). The ordinance in *Hill* places an eight feet restriction on solicitors, allows panhandling in other areas of the city, and satisfies the government interest of safety. Starwood City Code § 22-13 (2016); *Hill*, 530 U.S. at 719. The State's argument relies heavily on this case. However, the ordinance in *Hill* is distinguished from the Starwood ordinance in several ways. Starwood City Code § 22-13 (2016); *Hill*, 530 U.S. at 719. The Starwood ordinance specifically restricts what a person can say while the Colorado ordinance includes the element of intent to persuade. Starwood City Code § 22-13(a)(1) (2016); *Hill*, 530 U.S. at 719. The Starwood ordinance gives no mention or value to the intent of the actor. Starwood City Code § 22-13 (2016). This ordinance is not narrowly tailored. R. at 12. As an alternative, Mr. Strong could hold a sign to ask for a donation without speaking. Mr. Strong also has the option of standing and waiting for a pedestrian to approach him. However, these channels are not ample because they do not guarantee his survival. A pedestrian likely will not voluntarily walk up to a stranger they assume is homeless to ask if they need money.

The government has the burden to prove all three elements of the intermediate scrutiny test. *Ward*, 491 U.S. at 791. The ordinance fails and would not be content-neutral if one element is not

satisfied. *Id*. at 791; R. at 12. The regulation is not narrowly tailored because it goes beyond time, place, and manner restrictions. R. at 12-13. The regulation does not satisfy the government interest of public safety and does not leave open ample alternative channels for communication. *Id.* This regulation fails intermediate scrutiny, is not content-neutral, and is thus unconstitutional.

The First Amendment allows restrictions to the time, place, and manner of speech. U.S. Const. amend. I. The Starwood ordinance restricts the content of speech making it content-based on its face and fails under strict scrutiny analysis. Starwood City Code § 22-13 (2016). The government's purpose to protect their citizens from aggressive and unconsented solicitation is not narrowly tailored because it restricts speech pertaining to immediate donation and solicitation while allowing all other speech. The First Amendment protects one's right to panhandle, and the Starwood ordinance is content-based and thus unconstitutional. Starwood City Code § 22-13 (2016); *Thayer*, 144 F. Supp. 3d at 232.

II. Mr. Strong's Fourth Amendment right was violated because he had a subjective expectation of privacy that society already accepts in his possessions inside his home.

The Framers of the Bill of Rights intended the Fourth Amendment to extend both inside and outside the home. *United States v. Chadwick,* 433 U.S. 1, 8 (1977). The Amendment protects people from unreasonable searches and seizures. U.S. Const. amend. IV. Absent few exceptions, this amendment holds searches and seizures conducted without obtaining a warrant or prior judicial approval *per se* unreasonable. U.S. Const. amend. IV; *Katz v. United States,* 389 U.S. 347, 357 (1967). The protection of this amendment only extends to those situations reasonably expected to remain private by an individual. *Oliver v. United States*, 466 U.S. 170, 177 (1984).

Courts use a two-part test to determine whether to apply Fourth Amendment protection. *Id.* One part requires an individual to have a reasonable, subjective expectation of privacy not limited

to effects in this instance. *Katz*, 389 U.S. at 361. The other part requires society to view that expectation of privacy as reasonable. *Id.* One part is subjective and the other is objective. *Id.* Because the authority of a Supreme Court case is mandatory on issues of federal law, the similar outcome in *Katz* controls the present case. *Id.* at 348.

A. Society objectively recognizes Mr. Strong's expectation of privacy.

First, the Court should consider whether society's perception of Mr. Strong's home and effects deserve protection from unwarranted government searches and seizures. *Id.* at 361. *Katz* sets a standard for the expectation of society as "reasonable." *Id.* Reasonable means anything not visible by public view. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Whether society has a reasonable expectation of privacy in Mr. Strong's home and effects is an issue of law. *Idaho v. Pruss*, 181 P.3d 1231, 1234 (Idaho 2008). Although his tent resides in a public place, his tent is not transparent. R. at 7-8. The tent was intended to secure Mr. Strong's possessions from a passing eye, just as a telephone booth in a public area intends to secure a conversation from a passing ear. *Katz*, 389 U.S. at 352; R. at 35.

In *Colorado v. Schaefer*, the Court held a "transient" living in a tent in a publicly accessible area had a reasonable expectation of privacy in his tent. 946 P.2d 938, 940 (Colo. 1997). Neither fences nor signs to deter unwelcome individuals were present on the land. *Id.* The entrance to Schaefer's tent, zipped shut, contained his personal belongings, not able to be seen from the outside. *Id.* Police officers nevertheless searched both his tent and the backpack inside his tent without a warrant and without Schaefer being present. *Id.* The tent contained clothes, a bedroll, and a backpack. *Id.* The court held that tents have long served as a place of dwelling for people and shield its contents from public view. *Id.* at 942. The court reasoned that because Schaefer took

efforts to conceal his belongings by hiding them from public view, his case passed both parts the test. *Schaefer*, 946 P.2d at 943; *Katz*, 389 U.S. at 361.

Schaefer proves similar to Mr. Strong's case. 946 P.2d at 943. Mr. Strong's home was on publicly accessible land, contained clothes, a bedroll, and a storage bin. R. at 4, 8. Each of these items were concealed from public view. R. at 8. Officer Brown entered the park with the intent of finding where Mr. Strong lived. R. at 40. Officer Brown proceeded, without the consent of Mr. Strong or a warrant, to enter his tent. R. at 40. Next, she opened the plastic bin, moved aside his bedroll, and found Mr. Strong's license. R. at 20. After unlawfully entering and opening a concealed container, she untied and unrolled his bedroll and found a plastic bag that appeared to contain contraband. R. at 40. *Schaefer* established that a closed container, such as a plastic bin or bedroll, has a subjective and objective expectation of privacy because closed containers shield its contents from public view. *Schaefer*, 946 P.2d at 942; *Arkansas v. Sanders*, 442 U.S. 753, 765 (1979). Thus, Officer Brown violated Mr. Strong's Fourth Amendment right to privacy by opening his plastic bin and unrolling his bedroll without probable cause, a warrant, or consent. U.S. Const. amend. IV; *Schaefer*, 946 P.2d at 942; R. at 20.

1. Mr. Strong's tent is a home which receives the highest protection under the Fourth Amendment.

At its foundation, the Fourth Amendment establishes a person's right to retreat to their home. *Kyllo v. United States*, 533 U.S. 27, 31 (2001). A home receives the highest protection meaning unreasonable searches and seizures of the home are *per se* unreasonable. *Id.* Black's Law Dictionary defines a "home" as "a dwelling place." *Home, Black's Law Dictionary* (10th ed. 2014). This definition does not mention a roof, door, or walls. *Id.* Neither structure, permanence, nor grandeur are required factors in granting a dwelling the respect given to preserve the sanctity of

the home. *Pruss*, 181 P.3d at 1234. Thus, it does not matter that his tent lacked permanence. *Pruss*, 181 P.3d at 1234; R. at 8. Mr. Strong's tent is a home and is owed the utmost protection under the Fourth Amendment.

The record alone proves that Officer Brown thought the tent was Mr. Strong's home. R. at 40. Officer Brown stated it was rare someone lived in the park. R. at 39. When Officer Brown entered the park, she was looking for the home of Mr. Strong. R. at 4. When she came upon the clothesline and tent, Officer Brown stated that "[she] thought the defendant probably lived there." R. at 40. She found the bag of contraband only after entering the tent, opening the storage bin, and moving the bedroll. *Id.* Strong kept his personal belongings, including books, his purple medal from his time serving in the military, and other personal items, in the tent. *Id.*

A tent being occupied for habitational use is given Fourth Amendment protection. *Schaefer*, 946 P.2d at 941. In light of the Fourth Amendment, the court in *Schaefer* held that a person who has not received prior notice and is camping on government property has a subjective expectation of privacy and society readily accepted this expectation. *Id.* In *Idaho v. Pruss*, the court held that a person using a tent as their home on government property has a reasonable expectation of privacy in their tent and the government may not infringe on this right. 181 P.3d at 1235. Mr. Strong's case proves similar to both cases. While Mr. Strong was camping on government property, the record does not state he was given prior notice to vacate the park. R. at 4. Society recognizes a tent to be a home. *See Pruss*, 181 P.3d at 1234 (stating structure does not determine what is recognized to be a home); *see Schaefer*, 946 P.2d at 941 (holding tents have long served as a place of dwelling for people). Since Mr. Strong's tent proves similar to the tents in these two cases, society is ready to recognize his tent as a home. *Id.*

2. If not recognized as a home, Mr. Strong's tent is still protected because the Fourth Amendment protects people and their effects, not places.

Structures other than homes are subject to Fourth Amendment protection. *Pruss*, 181 P.3d at 1234. The Fourth Amendment "protects people, not places." *Katz*, 389 U.S. at 351-52. Further, the Fourth Amendment protects "houses, papers, and effects." *Oliver*, 466 U.S. at 176. In *Katz*, the Court held that a person has a reasonable expectation of privacy in his conversation in a public phone booth. 389 U.S. at 352. The Fourth Amendment and Article I, § 17 of the Constitution extends protection to those who are engaged in illegal activities. *Pruss*, 181 P.3d at 1236. To not allow this protection would "diminish the rights of" those following the law. *Id.* Additionally, in *Pruss*, the court held David Pruss had a reasonable expectation of privacy in his tent and effects even after he was arrested. *Id.* at 1232. In *Pruss*, the court did not specifically mention, nor did the defense argue, that Pruss's tent was his home. *See Pruss*, 181 P.3d 1231 (avoiding any discussion of whether Pruss's tent was a home). Nevertheless, the court held that the police officers illegally searched Pruss's tent without a warrant. *Id.* at 1233.

Mr. Strong, like in *Pruss*, also resided in a tent on public grounds and his personal belongings were concealed in his tent from public view. *Pruss*, 181 P.3d at 1233; R. at 4. Whether the Court recognizes a homeless individual's tent as a home does not invalidate the Fourth Amendment protection a human deserves in their personal belongings concealed from public view. *See Pruss*, 181 P.3d at 1234 (stating that a person can have a reasonable expectation of privacy in an area other than the home). As held in *Pruss*, the remote location of Mr. Strong's tent does not justify a warrantless search. *Pruss*, 181 P.3d at 1234; R. at 43. The court in *Pruss* noted that campers usually seek remote locations to pitch their tents. 181 P.3d at 1235. With this custom, the court gives Fourth Amendment protection to the temporary homes of these campers. *Id.* Even though Mr.

Strong's home is a not a permanent shelter, society recognizes temporary homes as having Fourth Amendment protection. *Pruss,* 181 P.3d at 1235; R. at 7. Even the Framers of the Fourth Amendment recognized tents of traveling Native American's as temporary homes. R. at 7. Mr. Strong's tent is a temporary home that should be given Fourth Amendment protection. *Id.*

In *United States v. Gooch*, the Court states that society views a tent on a public campground as having an objective, reasonable expectation of privacy. 6 F.3d 673, 677 (9th Cir. 1993). What a citizen intends to conceal as private, even if located in a publicly accessible area, has Fourth Amendment protection. *Chadwick*, 433 U.S. at 7 (ruling a locker in a public place cannot be searched without a warrant). Mr. Strong's tent was in Confluence Park, a government owned, publicly accessible park used for recreational activities. R. at 6. This park consisted of a baseball field, a playground, and a pond. R. at 25. These areas are each used for recreational activities. *Id.* Several states recognize camping as a recreational activity. *Pruss*, 181 P.3d at 1235 (stating camping is a longstanding recreational activity); *Schaefer*, 946 P.2d at 944 (granting privacy protection to visitors engaged in recreational activities like camping in tents). Using public lands for recreational activities is encouraged and considered a benefit to society. *Pruss*, 181 P.3d at 1235. The court in *Pruss* held that a person on public land using a temporary shelter has an objective expectation of privacy and are protected under the Fourth Amendment from unwarranted searches and seizures. *Id.* Mr. Strong's case proves similar because he was participating in a recreational activity on government property and using his tent as a temporary shelter to further this purpose. R. at 4.

Whether the area was a designated campground has no relevance to the expectation of privacy given by society. *Pruss*, 181 P.3d at 1236. People partaking in recreational activities, such as camping, often seek secluded areas away from designated, populated areas. *Id.* The fact that Mr.

Strong chose a secluded section shows he intended his area to remain private from the passing eye. R. at 8. Officer Brown also testified this location is not well traveled by visitors of the park and the area is not visible to the common visitor of the park. R. at 43. Additionally, Mr. Strong's tent, a forest green color, camouflages well with its surroundings of trees, bushes, and sticks. R. at 45. Mr. Strong's plastic bin was closed and not transparent. R. at 8. His bedroll was zipped and the plastic bag inside his bedroll was not able to be seen from outside the tent. *Id.* Even if the front flap of the tent was unlatched, Mr. Strong undertook specific, intentional efforts to hide his effects inside his tent from the public view. *Id.*

If the court fails to recognize Mr. Strong's tent as a home, the privacy of Mr. Strong's tent is still protected because his personal belongings, or his effects, were concealed from the public view. *See Katz*, 389 U.S. at 361 (deciding the Fourth Amendment protects people and their effects); *see also Pruss*, 181 P.3d at 1232 (granting privacy protection to personal effects in a tent). Being in a publicly accessible area does not negate Fourth amendment protection. *Chadwick*, 433 U.S. at 7. Additionally, people engaging in recreational activities, such as camping, also have a subjective and objective expectation of privacy in their tents. *Pruss*, 181 P.3d at 1235. Therefore, Mr. Strong's possessions and tent are within the ambit of the Fourth Amendment. R. at 5.

B. Mr. Strong established his subjective expectation of privacy by verbally stating his expectation to the officers.

Mr. Strong established a legitimate expectation of privacy in his tent and the possessions contained inside his tent. R. at 8. Whether an individual has a subjective expectation of privacy is an issue of fact. *Pruss*, 181 P.3d at 1234. The court determines the legitimacy of a seizure claim by using the totality of the circumstances, meaning no bright-line rule governs. *United States v. Sandoval*, 29 F.3d 537, 540 (Fed. Cir. 1994) (holding a vehicle is granted privacy protection).

The court must approach this issue on a case by case matter by looking at the facts. *Sandoval*, 29 F.3d at 541. In *Pruss*, the court held one can "infer" an individual to have a subjective expectation of privacy in a dwelling, even if temporary, such as a tent. 181 P.3d at 1234. Courts observe the actions and intent of the actor to decide whether they possessed a subjective expectation of privacy in their belongings. *See United States v. Sandoval*, 200 F.3d 659, 660 (Fed. Cir. 2000) (holding Sandoval had a subjective expectation of privacy in his tent because of the actions he took to seclude himself and his belongings). In *United States v. Sandoval*, the court ruled Sandoval had a subjective expectation of privacy in his tent because he placed the tent in a remote, wooded, publicly accessible area. 200 F.3d at 660. The court held that a reasonable person in Sandoval's situation would expect privacy in their belongings. *Id.*

Mr. Strong's case proves similar because he located his tent in a secluded area of publicly accessible land. *See Sandoval*, 200 F.3d at 660 (ruling a tent is given Fourth Amendment protection because it is in a secluded area and contains personal belongings); R. at 5. Mr. Strong verbally expressed his expectation of privacy upon seeing Officer Brown search through his belongings. R. at 5. Mr. Strong stated, "Hey that's my property! You can't just go through it without my permission!" *Id.* His verbal expression alone is enough to satisfy his subjective expectation of privacy. *See Katz*, 389 U.S. at 347 (reasoning that a defendant asserting his right to privacy justifies a subjective expectation of privacy in their effects); R. at 5.

Generally, a person has a reasonable expectation of privacy in closed containers. *Sanders*, 442 U.S. at 765 (requiring a warrant to search luggage and closed containers). The walls of Mr. Strong's home shielded his bedroll and plastic bin from public view. R. at 5. Before his bedroll was closed, a second layer of protection was given to the plastic bag illegally obtained by the officer. R. at 45. Therefore, a reasonable person can infer Mr. Strong believed he had a legitimate

expectation of privacy in his effects located in closed containers and a closed bedroll that were concealed by the four walls of his tent. *Pruss*, 181 P.3d at 1234; R at 5.

In *California v. Greenwood*, the court did not recognize the defendant's subjective expectation of privacy in the trash he left on the curb of his property. 486 U.S. 35, 40 (1988). However, the defendant voluntarily and intentionally discarded these items for a third party to collect. *Id.* Discarded trash is no longer one's personal belongings. *Id.* In contrast, Mr. Strong took several precautions to secure his belongings. R. at 8. He placed his tent in a secluded section of Confluence Park and kept his personal items out of public view. *Id.* Specifically, his items were concealed by the walls of his tent, his bedroll, and closed containers. R. at 45.

Mr. Strong intended to return to his personal belongings located in the park. R. at 8. The facts clearly establish Mr. Strong was using the area since he had laundry hanging out to dry. R. at 49. Additionally, Officer Brown stated in her cross examination that Mr. Strong did not appear to abandon his property. R. at 43. Therefore, Mr. Strong did not abandon his tent and intended to return to his dwelling. *Id.*

Mr. Strong clearly established his subjective expectation of privacy in his tent and belongings by his words and conduct, both matters of fact. *Pruss*, 181 P.3d at 1234; R. at 5. His verbal statement and the location and manner in which he placed his possessions satisfy the subjective part of the test. *Katz*, 389 U.S. at 347; R. at 5-6.

C. Even if Mr. Strong was found to have trespassed on government property, that does not deny him protection from warrantless searches.

Article IV of the Constitution gives Congress the power to regulate property owned by the government. U.S. Const. art. IV, § 3, cl. 2. In regard to their land, the government has the right of an "ordinary proprietor." *United States v. Ruckman*, 806 F.2d 1471, 1472 (Fed. Cir. 1986). This

means the government has the right of possession and may prosecute those illegally on their land. *Id.* Mr. Strong's tent was on government property. R. at 17.

The Court in *Katz* held that claiming Fourth Amendment protection does not depend on a property right given to the invaded space; rather, it depends upon whether the person claiming Fourth Amendment protection has a legitimate expectation of privacy in that area. *Katz,* 389 U.S. 347 at 353. Therefore, the rules of property law do not determine an individual's expectation of privacy. *See Katz,* 389 U.S. 347 at 353 (holding the trespass doctrine is not controlling); R. at 72.

In *Ruckman,* the court held that a person does not have a reasonable expectation of privacy in a natural cave owned by the Bureau of Land Management. *Ruckman,* 806 F.2d at 1471. This case is distinguished from the present case because a cave created naturally is not the same as a tent pitched by an individual. *Id.* at 1472. Mr. Strong set up his tent to create a shelter for himself and to give himself privacy. R. at 6. Mr. Strong's tent was not owned by the government, unlike a cave formed from the earth of government land. *Id.* The tent was in a public park, meant for the recreational use of the residents of Starwood. R. at 6. Camping is a recreational activity, and Mr. Strong is a resident of Starwood. R. at 4; *see Pruss,* 181 P.3d at 1235 (recognizing camping as a recreational activity); *see also Schaefer,* 946 P.2d at 944 (indicating that camping as a recreational activity). Additionally, the State has not carried their burden of proof to establish whether Mr. Strong trespassed on government land. R. at 8. Therefore, the issue of trespassing is not relevant to the case at hand, and even if it were, it does not distinguish his Fourth Amendment protection.

It has long been established that the Fourth Amendment "protects people, not places." *Katz,* 389 U.S. 347 at 351-52. Failing to be lawfully on the invaded property does not, *ipso facto,* deny an individual a legitimate expectation of privacy in that place. *Katz,* 389 U.S. 347 at 353. Whether Mr. Strong had a legal right to be in Confluence Park does not take away his Fourth Amendment

protection in his effects. R. at 17; s*ee Katz*, 389 U.S. 347 at 353 (indicating that the Fourth Amendment protects more than just places). Rather, the Court must look to the test, established in *Katz*, to find the subjective expectation of privacy society will recognize and that Mr. Strong is owed. *Katz*, 389 U.S. at 357.

D. The Open-Fields Doctrine is not relevant to the present case because a tent is not an open field.

Mr. Strong's tent is not subject to the Open-Field Doctrine because his tent is not an open field. The Open-Field Doctrine states that an open field does not support a reasonable expectation of privacy, even if a person asserts a strong subjective privacy interest. *Oliver*, 466 U.S. at 179-84. Open fields are generally more accessible and visible to the public and the police, unlike a home or office because of their open structure. *Oliver*, 466 U.S. at 179. According to Black's Law Dictionary, the "Open-Field Doctrine" states that one does not have "a reasonable expectation of privacy in anything in plain sight." *Open-Field Doctrine, Black's Law Dictionary* (10th ed. 2014). In *Oliver v. United States*, police officers walked around the side of the property and saw marijuana plants growing in Oliver's open field. 466 U.S. at 173. Oliver visibly did not intend to hide his plants since they were visible to any person walking by his land. *Id.* at 181.

A tent is not an open field. The case at hand is distinguished from *Oliver*. *Id.* at 173. Mr. Strong may not have had a reasonable expectation of privacy in his curtilage, or the area immediately surrounding his home, like his clothesline. R. at 49. However, the inside of his tent is not an open field and is not subject to the same visibility as an open field. *See Oliver*, 466 U.S. at 179 (distinguishing an open field from a home, office, or other structure); R. at 6. Mr. Strong's home is composed of opaque walls which conceal his personal belongings inside from persons standing outside the tent. R. at 8, 45. Mr. Strong took reasonable efforts to conceal his personal belongings

inside his bedroll and plastic bin all located inside his home. R. at 8. Because the tent is made of opaque material, Officer Brown had to untie and unroll the bedroll before finding the contraband. R. at 8, 46. This tent, although located in an open field, is an exception to the open field rule because the tent shields its contents from public view. R. at 6.

Society recognizes tents as homes deserving of privacy protection. Mr. Strong deliberately established his subjective expectation of privacy. Therefore, Mr. Strong's tent is owed the utmost protection under the Fourth Amendment. Even if not deemed a home, Mr. Strong's effects deserve protection from unreasonable searches.

CONCLUSION

Both Mr. Strong's freedom of speech and right to privacy were unjustly violated. The Starwood ordinance proves content based on its face due to its restriction on what a person says, rather than the manner in which the speech is said. Mr. Strong's home was illegally searched because society recognizes a person's homes and effects as private and therefore affirmed Fourth Amendment protection. Mr. Strong, as a citizen and veteran of the United States, deserves the protection of the fundamental rights he fought to protect.

For these reasons, we pray the Court will reverse the judgments of the Supreme Court of West Columbia, the West Columbia Court of Appeals, and the District Court of Jackson County, West Columbia, and render judgment in favor of Petitioner, Mack Strong.

Respectfully Submitted,

/s/_Louisa Karam
Louisa Karam
One Camino Santa Maria
San Antonio, Texas 78228

Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that on March 6, 2020, I electronically filed the Petitioner's Brief with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to Counsel for the Respondent:

Stretched Too Thin Prosecutor,
Jackson County District Attorney's Office,
1986 Westwood St.,
Starwood, West Columbia, 45555.

/s/_Louisa Karam
Louisa Karam

Counsel for Petitioner
Jackson County Public Defender Office
One Camino Santa Maria
San Antonio, Texas 78202